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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

ROBERT F. PIERCE and URSULA S. PIERCE, Appellants

v.

DONALD W. BIERER, JR. and DOVER VOLKSWAGEN INC., a Delaware corporation, Appellees

ON APPEAL FROM THE SUPREME COURT OF DELAWARE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

(1) Should this Court now reconsider its decision in Silver v. Silver, 280 U.S. 117 (1929), that "automobile guest statutes" do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

(2) Does the equal protection analysis employed in Silver v. Silver, supra, and relied upon by the Supreme Court of Delaware in upholding the validity of Delaware's Automobile Guest Statute, 21 Del. C. §6101, embody the correct equal protection standard of review as applied by the Court today in such cases?

(3) Under present-day conditions, does the classification drawn by the Delaware Automobile Guest Statute, 21 Del.C. §6101, as between "guests without payment"

and all other occupants of a motor vehicle, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

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THE OPINION BELOW

The opinion of the Supreme Court of the State of Delaware in this case is officially reported at 447 A.2d 1189 and is also set forth in the Appendix at p. 1a et.seq.

GROUND OF JURISDICTION

This case is an action to recover damages for personal injuries sustained by the Appellant Robert F. Pierce, in an automobile accident. At the time of the accident the Appellant was a guest passenger in an automobile operated by the Appellee Donald W. Bierer, Jr. and owned by the Appellee Dover Volkswagen, Inc.

The Supreme Court of the State of Delaware affirmed the granting of summary judgment in favor of the Appellees on the basis of the Delaware Automobile Guest Statute, 21 Del.C. §6101, which, by its terms, prohibits a cause of action by a guest passenger against the owner or operator of the vehicle, unless the accident was caused by the owner or operator's intentional act or his willful

or wanton conduct. In so ruling, the Supreme Court of Delaware explicitly rejected the Appellants contention that 21 Del.C. §6101, as applied, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The judgment of the Supreme Court of Delaware was entered on July 9, 1982. The notice of appeal to this Court was filed in the Supreme Court of Delaware on September 20, 1982

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal from a final judgment rendered by the Supreme Court of the State of Delaware, where there was drawn into question the validity of 21 Del.C. §6101, on the ground that it is repugnant to The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and the decision was in favor of its validit

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the

Fourteenth Amendment to the Constitution of the United States:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Title 21, Section 6101 of the Delaware Code which states:

> (a) No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful or wanton disregard of the rights of others.
>
> (b) Subsection (a) of this section shall not relieve a public carrier or any owner or operator of a motor vehicle while the vehicle is being demonstrated to a prospective purchaser of responsibility for any injuries sustained by a passenger being transported by such public carrier or by such owner or operator.

STATEMENT OF THE CASE

On February 15, 1978, Appellant Robert F. Pierce was employed as a salesman for a pharmaceutical company. He had been making calls in the Dover, Delaware area that day and was staying overnight at a local motel. About 11:00 P.M., he left the motel and drove to a nearby tavern to watch a heavyweight championship fight that was being shown on television.

At the tavern, he met Appellee Donald W. Bierer, Jr. ("Bierer"), a friend he had known for about ten years. Bierer was employed as a car salesman by Appellee Dover Volkswagen, Inc. ("Dover VW") and had driven to the tavern that evening in a demonstrator vehicle that was owned by Dover VW. At the tavern, Pierce shared a pitcher of beer with Bierer and a co-worker of Bierer's. At approximately 1:00 A.M. Pierce and Bierer decided to go to a nearby restaurant for breakfast. When they got outside the tavern, Bierer offered to drive Pierce to the restaurant and then back to his car. Pierce

accepted the offer.

Enroute from the tavern to the restaurant, Pierce sustained serious personal injuries when Bierer's vehicle skidded on ice, went through a stop sign at an intersection, and was struck by a tractor trailer. Pierce has no independent recollection of how the accident occurred. Bierer was ultimately charged by the Dover City Police with "careless driving" under 21 Del.C. §4176(a), to which charge he entered a plea of guilty on February 20, 1978. On February 12, 1980, Pierce filed an action for personal injuries against Appellees Bierer and Dover VW; his wife, Ursula S. Pierce, brought a derivative action for loss of consortium.

(1) How the Issues Sought to Be Reviewed Were Raised and Decided In the Trial Court

The action was commenced by the Appellants in the Superior Court of the State of Delaware ("Trial Court"). The Complaint alleged, in the alternative, that the accident was caused

by either the ordinary negligence or the "willful or wanton misconduct" of the Appellees. In the Answer filed April 29, 1980, the Appellees denied any negligence and pleaded as an affirmative defense that the Appellants' claims based upon ordinary negligence were barred by the Delaware Automobile Guest Statute, 21 Del.C. §6101. Following discovery, the Appellees filed a Motion for Summary Judgment on Feburary 3, 1981.

The issues sought to be reviewed in this appeal were raised for the first time by the Appellant in the Appellant's Brief in Opposition to Motion for Summary Judgment, filed March 31, 1981. Therein, the Appellant conceded that he was a "guest without payment" under 21 Del.C. §6101 and that the circumstances of the accident did not rise to the level of willful or wanton misconduct by Appellees, as required by the Guest Statute, 21 Del.C. §6101. Appellants did contend, however, that the Guest Statute should not be applied because it was repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States

Constitution. Following oral argument, the Trial Court issued its Opinion and Order on October 29, 1981. The Trial Court specifically rejected the Appellants' claim that the Guest Statute was unconstitutional, stating that the constitutional issue was controlled by Justice v. Gatchell, Del. Supr., 325 A.2d 97 (1974)[1], wherein the Supreme Court of Delaware had previously upheld the Guest Statute against a similar constitutional challenge. The Trial Court therefore granted summary judgment in favor of Appellees on the basis of the Guest Statute. The decision of the Trial Court is set forth in the Appendix hereto at p. 9a.

(2) How the Issues Sought To Be Reviewed Were Raised and Decided In the Appellate Court

Appellants filed a timely appeal from the Trial Court decision to the Supreme Court of the State of Delaware. In the Briefs filed in that Court, the Appellants renewed their at-

1. For the convenience of the Court, the decision of the Supreme Court of Delaware in Justice v. Gatchell is set forth in the Appendix hereto at p. 17a.

tack on the Guest Statute on the ground of repugnancy to the Equal Protection Clause of the Fourteenth Amendment.

Specifically, Appellants argued that Justice v. Gatchell should be reconsidered and overruled because:

(1) The Court's reliance, in that case, on Silver v. Silver, 280 U.S. 117 (1929), as being dispositive of any equal protection challenge to the guest statute, was incorrect;

(2) the federal equal protection standard of review employed in Justice v. Gatchell and Silver v. Silver is contrary to the standard of review now employed by the United States Supreme Court in such cases;

(3) the Delaware Supreme Court's self-created "doctrine of judicial self-restraint", employed in Justice v. Gatchell, cannot be employed, as

a matter of federal constitutional law, where the Guest Statute is challenged as violative of the Fourteenth Amendment;

(4) under present day conditions, the classifications created by the Delaware Automobile Guest Statute do not advance any legitimate goals in a rational manner, and, hence, are violative of the Equal Protection Clause of the Fourteenth Amendment.

Following briefing and oral argument, the Supreme Court of Delaware issued its decision on July 9, 1981. All of the Appellants' arguments were rejected, the Court stating:

> "We have reviewed the cited cases relied upon by the plaintiffs and find none to be controlling. None involves a Guest Statute of this or any other state and, therefore, cannot be said to bespeak a shift in the Supreme Court's viewpoint on the subject.
>
> On the contrary, we find it significant that Silver, decided in 1929

still remains the last word by the U.S. Supreme Court on Automobile Guest Statutes in relation to equal protection rights." (p.6a).

* * * *

"Accordingly, we find nothing has developed since Justice v. Gatchell to alter the stare decisis value of that case as to the constitutionality of the Automobile Guest Statute. We adhere to the rationale adopted and conclusions reached therein. If changes are to be made, the General Assembly must take the action." (p. 7a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Preliminary Statement

The decision below, upholding the validity of 21 Del.C. §6101 against Appellants' equal protection challenge, rests squarely upon the Delaware Supreme Court's view that Silver v. Silver, 280 U.S. 117 (1929), wherein Connecticut's automobile guest statute was upheld against a similar equal protection challenge, "still remains the last word by the U. S. Supreme Court on Automobile Guest Statutes in relation to equal protection rights." (p.6a). The decision below also rests, in part, upon the Delaware Supreme Court's

view that its decision in Justice v. Gatchell Del. Supr., 325 A.2d 97 (1974), which was reaffirmed in this case, correctly defined and applied the equal protection standard of review presently employed by this Court in such cases. (p.7a).

In docketing this appeal, Appellants are certainly mindful that the mere existence of the Silver decision might tempt the Court to conclude that this appeal should be dismissed, "for want of a substantial federal question", because the constitutional issue "has been so explicitly decided [in Silver] as to foreclose further argument on the subject. Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902),at p. 314. Appellants urge the Court not to take that path. As we shall show herein, there are substantial and compelling reasons for the Court to accept jurisdiction in this case for the purpose of giving plenary reconsideration to Silver v.

Silver.[2]

If the Court is not inclined to reconsider Silver, then Appellants contend that the decision below still raises a substantial federal question whether the Delaware Supreme Court, as a matter of federal constitutional law, properly extended the ruling in Silver to the Delaware Guest Statute, and also whether the Delaware Supreme Court, in upholding the validity of the Delaware Guest Statute, cor-

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2. In urging the Court to reconsider Silver, Appellants recognize that, in recent years, this Court has summarily dismissed appeals raising similar constitutional claims involving the automobile guest statutes of other states. Cannon v. Oviatt, Utah Supr., 520 P.2d 883, appeal dismissed, 419 U.S. 810 (1974); White v. Hughes, Ark. Supr., 519 S.W.2d 70, appeal dismissed 423 U.S. 805 (1975); Hill v. Garner, Ore. Supr., 561 P.2d 1016, appeal dismissed 434 U.S. 989 (1977). Although these decisions also amount to rulings on the merits of the equal protection issue, Hicks v. Miranda, 422 U.S. 332 (1975), it is also true that such dismissals are not accorded the same deference, as precedent, given a ruling after briefing, argument and a written opinion, for purposes of determining whether a substantial federal question is present in a case. Caban v. Mohammed, 441 U.S. 380 (1979) at p. 390 n.9.

rectly applied the appropriate equal protection standard of review, as applied by this Court in such cases.

The above issues are discussed in the subsections which follow.

B. The Decision in Silver v. Silver is Ripe for Reconsideration.

There is no litmus test to determine when a prior decision of this Court is ripe for reconsideration. However, a review of decisions where such reconsideration has taken place does reveal several factors which the Court apparently considers significant in making such a determination. These factors are: (1) the issue has continued to be a source of litigation and controversy in both state and federal courts; (2) the prior decision has been the subject of continuing critical commentary; (3) various Justices of the Court have expressed the view that the prior decision should be reconsidered. Gideon v. Wainwright, 372 U.S. 335 (1963), at p. 4 n.2.

Automobile guest statutes have existed at one time or another in 28 states.[3] All guest statutes were enacted between 1927 and 1939. Note, The Present Status of Automobile Guest Statutes, 59 Cornell L. Rev. 659 (1974), at p. 659. If Silver v. Silver, decided by this Court in 1929, is still the "last word . . . on automobile guest statutes", as the Delaware Supreme Court has concluded, the message clearly did not reach the highest courts of 7 states which have since held their automobile guest statutes unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Brown v. Merlo, Cal. Supr., 506 P.2d 212 (1973); Thompson v. Hagan, Idaho Supr., 523 P.2d 1365 (1974); Laakonen v. Eighth Judicial District Court, Nev. Supr., 538 P.2d 574 (1974); McGeehan v. Bunch, N.M. Supr., 540 P.2d 238 (1975); Primes v. Tyler, Ohio Supr., 331 N.E.2d 723 (1975); Ramey v. Ramey, S. Car. Supr., 258

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3. In Georgia, the guest passenger rule was judicially created. Epps v. Parrish, Ga. Supr., 106 S.E. 297 (1921). Judicially created guest passenger rules also existed at one time in Massachusetts and Wisconsin, but have since been abolished.

S.E.2d 883 (1979); Henry v. Bauden, Kan. Supr., 518 P.2d 362 (1974).[4]

The highest courts in 4 additional states have held their state's guest statutes to be invalid under state constitution equal protection clauses only. Bierkamp v. Rogers, Iowa Supr., 293 N.W.2d 577 (1980); Mainistee Bank & Trust Co. v. McGowan, Mich. Supr., 232 N.W.2d 636 (1975); Johnson v. Hassett, N.Dak. Supr., 217 N.W.2d 771 (1974). Nehring v. Russell, Wyo. Supr., 582 P.2d 67 (1978).

Automobile guest statutes still exist today only in Alabama, Arkansas, Delaware, Indiana and Utah.[5] Even in these states, the

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4. Those state high courts also found their guest statutes to violate equal protection clauses in their respective state constitutions.

5. Guest statutes have been repealed or substantially modified in 12 other states: Colorado (repealed by L.75 p.1568, Sec.1 (1975)); Connecticut (Conn. Acts 4404, repealed 1937); Florida (Fla. Stat. Ann. §320.59, repealed 1972); Illinois (Ill. Stat. Ann. Ch. 95½ §10-201[statute

supposed "last word" status of the Silver decision has not resulted in any abatement to the frequency with which challenges to these remaining guest statutes continue to be litigated on equal protection grounds. Beasley v. Bozeman, Ala. Supr., 315 So.2d 570 (1975); White v. Hughes, Ark. Supr., 519 S.W.2d 70, appeal dismissed, 423 U.S. 805 (1975); Rone v. Miller, Ark. Supr., 520 S.W.2d 268 (1975); Davis v. Cox, Ark. Supr., 593 S.W.2d 180 (1980); Delaney v. Mize, Ark. Supr., 599 S.W.2d 710 (1980); Justice v. Gatchell, Del. Supr., 325

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modified in 1971 to limit application to hitchhikers]); Montana (repealed by Ch. 236, Laws of 1975); Nebraska (1981 Neb. Laws. L.B.54 p. 214 [modified statute so as to apply only to close relatives of owner or operator]); Oregon (reference to automobiles in guest statute deleted by Or. Laws 1979, Ch. 866, §7); South Dakota (repealed by S.L. 1978, Ch. 240 §1); Texas (Ch. 28, §3 (1973), law modified to apply only to close relatives of owner or operator); Vermont (repealed 1970); Virginia (Va. Code, §8.01-63 (1977 Rep. Vol)); Washington (repealed by Laws of 1974 1st Ex. Sess. Ch. 3, §2. In Massachusetts, a judicially created guest rule (Masaletti v. Fitzroy, Mass. Supr., 118 N.E.168 (1917)) was repealed by Mass. Ann. Laws, Ch. 231 §85L (Supp. 1972).

A.2d 97 (1974); Pierce v. Bierer , 447 A.2d 1189 (1982); Sidle v. Majors, 536 F.2d 1136 (C.A. 7, 1976), cert. den. 429 U.S. 945 (1976); Brady v. Acs, Ind. Supr, 342 N.E. 2d 837 (1976); Cannon v. Oviatt, Utah Supr., 520 P.2d 883, appeal dismissed 419 U.S. 810 (1974); Critchley v. Vance, Utah Supr., 575 P.2d 187 (1978); Corey v. Jones, 650 F.2d 803 (C.A. 5, 1981); Bickford v. Nolen, Ga. Supr., 240 S.E. 2d 24 (1977).

Given the frequency of litigation outlined above, it is hardly surprising that the issue has also been subjected to much scholarly analysis and comment -- all critical of guest statutes in general and Silver v. Silver in particular. Some examples are: Lascher, Hard Laws Make Bad Cases -- Lots of Them (The California Guest Statute), 9 Santa Clara Law, 1 (1968); Note, Review of the Past, Preview of the Future: The Viability of Automobile Guest Statutes, 42 U. of Cinn. L. Rev. 709 (1973); Broadbent, The Utah Guest Statute: Has It Overstayed Its Welcome? 1978 Utah L. Rev. p. 509; Note, Alabama's Automobile

Guest Statute: The Edsel Lives! 33 Ala. L. Rev. 79 (1981); Muehlen, Guest Statute Violates Equal Protection of the Law, 50 N. Dak, L. Rev. 139; Note, Equal Protection Challenges to Automobile Guest Statutes, 8 Creighton L. Rev. 432 (1974); Note, The Present Status of Automobile Guest Statutes, 59 Cornell L. Rev. 659 (1974); Joost, The Automobile Guest Rule: Sound Public Policy or Legal Dinosaur, 2 Portia L.J. 105 (1966); Note, The Case Against the Guest Statute, 7 William & Mary L. Rev. 321 (1966).

The nearly continuous stream of litigation involving equal protection challenges to automobile guest statutes and the mounting criticism of Silver and its progeny have not passed unnoticed by the Members of this Court. In recent years, on two separate occasions, Justices White, Brennan and Marshall have expressed the view, for the same reasons expressed here, that Silver should be reconsidered. Sidle v. Majors, supra, (Brennan, J., dissenting) at p. 945; Hill v. Garner, supra, (White J., dissenting) at p. 989.

If the criteria outlined in Gideon v. Wainwright, supra, are any benchmark, the conflict and criticism that the Silver decision has spawned warrants that it be reconsidered, by any standard of measurement. Rather than settling the issue of the constitutionality of automobile guest statutes, Silver has been criticized and distinguished away in the 23 states where guest statutes have been nullified or repealed. In those states such as Delaware, where Silver is still regarded as "the last word" on the subject, the result has been challenge after challenge, rather than acceptance.

In this case, the Delaware Guest Statute was upheld against an equal protection challenge solely on the basis of Silver v. Silver. If, as we contend, Silver is now ripe for reconsideration, then this appeal raises a substantial federal question.

C. The Supreme Court of Delaware Did Not Apply the Proper Equal Protection Standard of Review

In the Supreme Court of Delaware, Appel-

lants contended that the Guest Statute's validity, under the Equal Protection Clause, could no longer be sustained on the basis of Silver v. Silver, supra, or Justice v. Gatchell, supra, because the "rational basis" equal protection analysis employed in those cases had been abandoned, as a matter of federal constitutional law, as evidenced by more recent decisions of the United States Supreme Court. This argument was explicitly rejected by the Supreme Court of Delaware:

> "The plaintiffs further remind us of the comment in Justice: 'If . . . the strictures of the Fourteenth Amendment [are to be] extended in this area of the law, we shall await the views of the United States Supreme Court on the subject.' (325 A.2d at 102). Those views have been manifested, plaintiffs assert, in a number of recent cases all of which, they say, now require a reversal of Justice. Specifically, plaintiffs cite U.S.R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 101 S.Ct. 453 (1980); Minnesota v. Clover Leaf Creamery Company, 449 U.S. 456, 101 S.Ct. 715 (1981); Schweiker v. Wilson, 450 U.S. 211, 101 S.Ct. 1074 (1981); and Logan v. Zimmerman Brush Co., _____ U.S. _____, 102 S.Ct. 1148 (1982)
>
> We have reviewed the cited cases relied upon by the plaintiffs and find none to be controlling. None involves a Guest Statute of this or any other state, and therefore, can-

not be said to bespeak a shift in the Supreme Court's viewpoint on the subject." (p.6a- 7a)

Appellants agree that the standard of review applicable to the Delaware Guest Statute, 21 Del.C. §6101, under the Equal Protection Clause is the "rational basis" test. Schweiker v. Wilson 450 U.S. 221 (1981) at p.230; Justice v. Gatchell, supra, at p.100 n.7 (p.25a).[6] Also, it is settled that the definition and application of the rational basis test is a matter of federal constitutional law, and that a state court's application of that standard is fully reviewable in this Court on appeal, where the decision below is in favor of the validity of the statute. 28 U.S.C. §1257(2). Cf. Minnesota v. Clover Leaf Creamery Company, 449 U.S. 456 (1981), at p.461 n.6.

In upholding the validity of the Guest Statute on the basis of Silver and Justice, the Supreme Court of Delaware necessarily concluded

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6. In the decision below, the Supreme Court of Delaware stated that the rationale and conclusions in Justice v. Gatchell, supra, were equally applicable to this case. (p.7a).

that those cases still express the correct statement and application of the rational basis test. Also, in distinguishing the more recent rational basis equal protection decisions cited by Appellants the Supreme Court of Delaware implicitly concluded that even if those decisions embody or announce a different statement or application of the rational basis test than Silver and Justice, such decisions should be disregarded because the particular statute under review in those cases "were not Guest Statute(of this or any other State". (p.6a). Appellants submit that the decision below, as outlined herein, raises a substantial federal question whether the Supreme Court of Delaware properly defined or applied the rational basis test to the Delaware Guest Statute as a matter of federal constitutional law.

In Silver v. Silver, supra, the Connecticut automobile guest statute was upheld according to the following equal protection standard of review:

> "It is said that the vice in the statute is not that it distinguishes between passengers who pay

> and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say a priori that the classification is one forbidden as without basis, and arbitrary." See Clark v. Deckebach, 274 U.S. 392, 397. Id at p. 123. (emphasis added)

In Justice v. Gatchell, supra, the Supreme Court of Delaware upheld the Delaware Guest Statute under the following equal protection standard of review:

> "In the area of equal protection especially, courts have traditionally afforded legislative classifications a presumption of reasonableness and constitutionality where discrimination is not based upon race, color, religion, ancestry, or other 'inherently suspect' classification requiring a more 'strict scrutiny'. 1 Antieau, Modern Constitutional Law §8.81, p. 630 (1969). A statutory discimination or classification will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961): Aetna Casualty & Surety Co. v. Smith, Del.Supr., 36 Del.Ch. 391, 131 A.2d 168 (1957)." Id at p. 102 (p.31a)

In the past, this Court has employed many different formulations of the rational basis equal

protection test.[7] Also, the issue of the proper expression and application of the rational basis test has been the subject of much recent debate and disagreement among the Justices of this Court.[8]

Most recently, in Schweiker v. Wilson, supra, a majority of the Court formulated the rational basis test so as to require the court to determine (in order to sustain the challenged statute) that:

> (1) the statute bears a rational relation to legitimate legislative goals; Id at p. 242-243.
>
> (2) that the classificatory line drawn by the legislature "is not wide of any reasonable mark". Id at p. 238 n.23.

In terms of the judicial role, the "any

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7. See the cases cited in U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) at p. 176 n.10.

8. See, U.S. Railroad Retirement Board v. Fritz, supra, at p. 176, n.10; Schweiker v. Wilson, supra, (Powell, J., dissenting) at p. 243 n.4.

conceivable basis" standard of Silver and Justice literally forecloses any judicial review of the challenged statute, except perhaps for the tautological recognition that the legislature did what it intended to do. U.S. Railroad Retirement Board v. Fritz, supra, (Stevens, J., concurring) at p. 180. The Schweiker "rational relation to legitimate legislative goals" test, on the other hand, requires the Court, at the minimum, to determine that the statute is not the result of official arbitrariness, unthinking prejudice, or favoritism U.S. Railroad Retirement Board v. Fritz, supra, (Stevens, J., concurring) at p.181; see, Michelman Politics and Values, Or What's Really Wrong With Rationality Review, 13 Creighton L.Rev. 487, 499 (1979).

The differences between Silver and Justice, on the one hand, and Schweiker, on the other, in terms of the expression and application of the equal protection rational basis test involve more than semantics. Appellants contend that the differences rise to a constitutional level, so that the Delaware Supreme

Court's adherence to the Silver and Justice test, in the face of this Court's decision in Schweiker, raises a substantial federal question.

Evidence that the Schweiker rational basis test is a constitutional rule is to be found in this Court's recent decision in Clements v. Fashing, _____ U.S. _____, 102 S.Ct. 2836 (1982). In Clements, certain provisions of the Texas Constitution relating to qualifications for elective office were challenged under the Equal Protection Clause. The majority opinion in the case was authored by Justice Rehnquist. In Part III of the Opinion (102 S.Ct. at p. 2843), Justice Rehnquist framed the rational basis test as empowering the court to strike down a classification "only if . . . based solely on reasons unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." Id. The above statement of the rational basis test is nearly identical to Silver and Justice. However, in Clements, the above statement of the rational basis test was specifically rejected by five Justices of this Court. Clements v. Fashing,

supra, (Brennan, J., dissenting) at p. 2850 n.1. Or the issue of the proper statement of the rational basis test, the four dissenting Justices were joined by Justice Stevens, who stated that he "surely could not subscribe to Justice Rehnquist formulation of the standard to be used in evaluating state legislation that treats different classes of persons differently." Clements v. Fashing, supra, (Stevens, J., concurring in the judgment), at p. 2850.

If the rational basis test, as formulated and applied in Schweiker v. Wilson, is a constitutional rule, it is binding on the Supreme Court of Delaware under the Supremacy Clause of Article VI of the Constitution. The reason given by the Supreme Court of Delaware for not applying the Schweiker rational basis test, i.e. the particular statute involved in Schweiker was not a "guest statute",must be rejected, for it practically flaunts the supremacy rule in favor of the narrowest possible interpretation of constitutional rules announced by this Court. Cf. Sims v. Georgia, 385 U.S. 538 (1966) at p.543.

Finally, even if the Supreme Court of Delaware had employed the proper equal protection rational basis analysis in this case and in Justice v. Gatchell, there is another aspect to its decisions which raises a substantial federal question. That is in the application in this case of the Supreme Court of Delaware's self-created "doctrine of judicial self-restraint" as applied to a statute challenged on federal equal protection grounds. (p.4a). In Justice v. Gatchell, supra, the doctrine was expressed as follows:

> "Having reached that conclusion, we become mindful of the traditional self-restraint of this Court whenever it becomes engaged in testing the constitutionality of an act of the General Assembly. Such self-imposed limitation has been expressed by this Court in varying but consonant terms; Legislative acts should not be disturbed except in clear cases, and then only upon weighty considerations; a legislative enactment is cloaked with a presumption of constitutionality and should not be declared invalid unless its invalidity is beyond doubt."
> Id at p.102 (p.29a).

When combined with the "any conceivable basis" equal protection standard, the doctrine

of judicial self-restraint virtually immunizes the Delaware Guest Statute from judicial review. As an independent ground for upholding the guest statute against a federal constitutional challenge, the doctrine has no parallel in federal constitutional law. In tilting the balance of power almost entirely in favor of the legislature, the doctrine imposes a greater restriction on the scope of judicial review than this Court imposes in such cases. Although we concede that the doctrine may be properly applied in non-federal constitutional cases, its application in this case was clearly improper. Minnesota v. Clover Leaf Creamery Company, supra, at p. 461. n.6.

D. The Delaware Guest Statute Is Repugnant to the Equal Protection Clause of the 14th Amendment

The Delaware Guest Statute, 21 Del.C. §6101 provides:

> "(a) No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or op-

erator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful or wanton disregard of the rights of others.

(b) Subsection (a) of this section shall not relieve a public carrier or any owner or operator of a motor vehicle while the vehicle is being demonstrated to a prospective purchaser or responsibility for any injuries sustained by a passenger being transported by such public carrier or by such owner or operator."

There is no recorded legislative history for the guest statute, which was enacted in 1933.[9] Traditionally, the classification thus drawn, as between "guests without payment" and all other occupants of a motor vehicle, requiring the former to prove "willful or wanton conduct" to recover damages for personal injuries, while allowing the latter to recover damages upon proof of ordinary negligence only, has been justified on two grounds:

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9. 38 Del. Laws, Ch. 26. An earlier version of the guest statute, which denied any recovery to a guest passenger,was declared unconstitutional in Coleman v. Rhodes, Del. Supr, 159 A.649 (1932). Also, the present statute was amended in 1949 to include reference to "boats airplanes and other vehicles". 47 Del. Laws Ch. 49.

(1) the protection of the hospitality of the host, and (2) the prevention of collusive litigation. Justice v. Gatchell, supra; at p. Robb v. Ramey Associates, Del. Super, 14 A.2d 394 (1940); Gallegher v. Davis, Del. Supr, 183 A.620 (1936).

In terms of equal protection rationality analysis, the judicial task is to determine if the above rationales for the guest statute are "legitimate governmental objectives" under present day conditions, and whether the classification drawn by the legislature "advances those objectives in a rational way". Schweiker v. Wilson, supra, at p. 234.

Appellants contend that the above legislative purposes can no longer be employed to justify the continued rationality of the Guest Statute. In the nearly 50 years since Delaware's Guest Statute was enacted, the relevant circumstances which previously justified its enactment have undergone such radical change that the guest statute is now an anachronism that is, indeed, antithetical to Delaware's current legis-

lative policies.

When Delaware's Guest Statute was enacted, the automobile age was in its infancy. There was approximately one passenger car for every five persons in the United States.[10] In those early days, the notion that guests in motor vehicles should be severely restricted in recovering damages from their host might well have been viewed as a socially acceptable cost to encourage those persons who owned automobiles to share the benefits of private transportation, much in the manner that "good samaritan" statutes encourage persons to render emergency assistance to injured persons. This emphasis on the protection of the host was no doubt reinforced by the then prevailing philosophy that automobile liability insurance was a protective rather than a compensatory device. See Weber, Guest Statutes, 11 U. Cinn. L. Rev. 24 (1937). In Delaware, the philosophy that liability insurance was viewed as a protective device is evidenced by the fact that the

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10. U.S. Bureau of the Census, Statistical Abstract of the United States (60th Ed., 1938), Tables 2, 429.

legislature did not enact a compulsory automobile liability insurance law until 1972.[11]

In today's society, where ownership and dependence on the automobile as a means of personal transportation is nearly universal,[12] the presence or absence of a Guest Statute does not affect the decision of friends or relatives to ride together in an automobile. Drivers may hesitate to pick up hitchhikers or other strangers, but not because of potential liability for negligence, ordinary or gross. Friends and relatives offer, seek, accept and decline rides with each other for reasons quite apart fron the ability to recover for negligently inflicted injury or loss. The presence of a guest

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11. Prior to 1972, Delaware had a "financial responsibility"law, which required a driver to show proof of financial responsibility only after the first accident. 29 Del.C. §2921, repealed by 60 Del. Laws 433, §4 (1976).

12. In 1979, there was one registered passenger car for every 2.1 persons in the United States U. S. Bureau of the Census, Statistical Abstract of the United States (100th Ed., 1979), Tables 2, 1101.

statute and its invidious discrimination thus no more promotes hospitality that its absence would tend to chill such activities.

These changing patterns in automobile use and dependency, together with the recognition that negligent use of the automobile causes staggering losses, in terms of personal injury, death, and property damages, has led to the nearly universal adoption of compulsory liability insurance laws. The adoption of such laws is clear evidence of the acceptance of the concept that such insurance is a compensatory rather than a protective device. According to one court, one of the most evident policies behind the enactment of such laws is to provide compensation to those injured through no fault of their own. Interinsurance Exchange of Auto Club v. Ohio Casualty Ins. Co., Cal. Supr., 373 P.2d 640, 645, (1962).

Since 1972, all motor vehicles registered in Delaware have been required to have insurance to indemnify the owner or operator from legal liability for bodily injury or death arising from the

ownership or use of the vehicle. 21 Del. C. §2118(a)(1). However, the current incongruity of the host protection doctrine does not rest alone on the enactment of compulsory insurance laws. This is so because Delaware has also enacted a so-called "no-fault" insurance scheme.

In addition to the required liability insurance, 21 Del. C. §2118(a)(2) requires the owner of a motor vehicle to pay compensation, irrespective of fault, to certain injured persons for their medical expenses and lost wages. This required coverage is known as PIP (personal injury protection) coverage. Under §2118(c), the PIP benefits are paid to each passenger occupying the owner's vehicle. Since Section 2118(c) makes no distinction between passengers who are non-paying guests and other passengers, the PIP benefits are thus available to guests and non-guests alike.[13] The continued existence of the Guest Statute thus makes possible the situation,

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13. In this case, Appellant Pierce was paid substantial PIP benefits by Appellees' insurance carrier.

which occurred in this case, whereby an injured guest passenger recovers compensation from his host for medical expenses and lost wages, without being required to prove any negligence on the part of the host, and yet is barred from recovering for pain and suffering or permanent injuries from the same "host" unless he can prove "willful or wanton misconduct".[14]

Since everyone is a potential "guest passenger", guests as a class are identically situated to the public as a whole in their ability to bear the economic consequences of a negligently inflicted injury. Also, the issue of ordinary negligence on the part of the vehicle operator is totally unrelated to the presence or absence of "guest passengers". By thus absolving some drivers from liability for ordinary negligence, the Guest Statute randomly denies some

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14. Several commentators have specifically noted the irrationality of the continued existence of guest statutes in states that have enacted "no fault" insurance schemes. See, Note, supra, 59 Cornell L. Rev. at p. 684-685; Broadbent, supra, 1978 Utah L. Rev. p. 509.

persons the protection of compulsory insurance laws by converting similar claims (all claims based on ordinary negligence) into dissimilar ones (guest vs. non-guest) and then using the distinction as the basis for the classification. Appellants submit that such random different treatment of identical claims is the essence of arbitrary state action. Cf. Logan v. Zimmerman Brush Co., _____ U.S. _____, 102 S.Ct. 1148 (1982), (Blackmun, J., separate opinion) at p. 1159-1161.

By enacting a comprehensive scheme of compulsory liability and no-fault insurance, the Delaware legislature has clearly abandoned the philosophy of "host protection" in favor of a public policy which assures compensation to persons who are injured through no fault of their own. The Guest Statute is irrational because it continues to rely on this discarded philosophy to deny to randomly determined persons the protection of compulsory insurance laws. What once may have been an act of legislative policy (wise or unwise) is now only an act of discrimination.

The second justification traditionally offered in support of the Guest Statute's classification scheme is the prevention of collusive litigation. Justice v. Gatchell, supra. This rationale proceeds from the premise that because guest passengers are often friends or relatives of the driver, they will "cooperate" to manufacture ordinary negligence in order to recover compensation for injuries from the "real" defendant -- the driver's insurance company.

Even if it is conceded that the legislative goal of preventing collusive lawsuits is a legitimate one, it nevertheless remains for the court to determine whether the means chosen -- requiring non-paying guests to prove willful or wanton conduct -- "advances legitimate legislative goals in a rational fashion". Schweiker v. Wilson, supra at p. 234.

The Guest Statute's classification, by definition, involves line-drawing which inevitably leaves some persons "outside the favored circle". Id at p. 238. In testing the rationality of a legislative classification under the rational

basis equal protection test, this Court has recognized the legislative need for approximation in choosing the means of serving the legislative end. In Dandridge v. Williams, 397 U.S. 471 (1970), the court stated that a classification would be upheld even though it was "not made with mathematical nicety or because in practice it results in some inequality". Id at p. 485. Most recently, in Schweiker v. Wilson, supra, the court stated that the decision of the legislature as to where the line should be drawn, "must be accepted unless we can say that it is very wide of any reasonable mark". Id at p. 238 n.23.

On the other hand, judicial tolerance of legislative approximation does have its limits. The rational basis standard is "not a toothless one". Schweiker v. Wilson, supra, at p. 234. The judicial task in this regard was aptly summarized by Justice Powell:

> " . . . the equal protection requirement does place a substantive limit on legislative power. At a minimum, the legislature cannot arbitrarily discriminate among citizens . . . . Enforcing this prohibition while avoid-

> ing unwarranted incursions on the legislative power presents a difficult task. No bright line divides the merely foolish from the arbitrary law." Schweiker v. Wilson, supra, (Powell,J., dissenting) at p. 243.

Notwithstanding the difficulty of the judicial task and the tolerance of legislative imprecision, there is one species of classification that the court has consistently invalidated under the rational basis standard. That species is the classification that is, at the same time, both "underinclusive" and "overinclusive" as a means of achieving the supposed legislative goals. Rinaldi v. Yeager, 384 U.S. 305 (1966); Lindsey v. Normet, 405 U. S. 56 (1972).

In Rinaldi, the Court invalidated a New Jersey statute which required indigent prison inmates who filed unsuccessful appeals to reimburse the court for the cost of the free transcript. No such reimbursement was required of non-inmates whose appeals were unsuccessful. Rinaldi v. Yeager, supra at p. 307. The state defended the statute as a rational means for deterring frivolous appeals. Id at p. 310. The statute in Rinaldi was

"overinclusive" because it irrationally assumed that all unsuccessful appeals by prisoners were frivolous. It was also "underinclusive" because it assumed that all unsuccessful appeals by non-prisoners were not frivolous. Id.

In Lindsey v. Normet, supra, the Court invalidated a statute which required a tenant to post a double-bond in order to appeal an adverse eviction judgment. The statute was defended as a reasonable means of detering frivolous appeals. The court rejected this argument, stating that the double-bond requirement was irrational to serve such purpose because it precluded meritorious appeals by those who could not afford the bond (overinclusive) and at the same time allowed meritless appeals by those who could afford the bond (underinclusive). Id p. 78.

Appellants contend that the Guest Statute is equally overinclusive and underinclusive as a means of preventing collusive litigation. As such, it stands on the same footing as the statutes invalidated in Rinaldi and Lindsey, Cf. Logan v. Zimmerman Brush Co., supra, (Blackmun, J., separate opinion) at p. 1160.

The Guest Statute is overinclusive because it irrationally assumes that all non-paying guests will conspire with their hosts to manufacture ordinary negligence. The Guest Statute thus sweeps within its ambit all claims by honest guests, all claims against honest hosts, all claims where negligence exists in fact, and even claims on behalf of persons such as infants, incompetents and deceased persons, who are incapable of collusion.

The Guest Statute is equally underinclusive as a means of preventing collusive lawsuits. By irrationally assuming that collusion will occur in all cases of ordinary negligence, the Guest Statute leaves untouched the fact that the circumstances that will take a case out of the operation of the Guest Statute are equally susceptable to fabrication as is negligence. Assuming that some hosts are willing falsely to admit negligence to enable some of their guests to recover against their insurance companies, they might be as willing falsely to admit gross negligence. Similarly, a showing that the journey was motivated in part by a definite tangible benefit to the host, re-

quires less imagination than fabrication of facts showing ordinary negligence. Foster v. Shropshire, Del. Supr., 375 A.2d 458, 460 (1977) (courts should "be wary of legal meanderings which too often result in bypassing the dictates of the Guest Statute). In fact, such cases (there are many of them) lend credibility to the proposition that the harsh operation of the Guest Statute, particularly in the face of the strong public policy that liability insurance is a compensatory device, actually promotes collusive litigation rather than prevents it.

CONCLUSION

For the foregoing reasons, this Court should determine that the questions presented herein are substantial and should note probable jurisdiction of this appeal.

Respectfully Submitted,

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Attorney for Appellants

STATEMENT PURSUANT TO RULE 28.4(c)

This appeal draws into question the constitutionality, under the Equal Protection Clause of the 14th Amendment to the United States Constitution, of Section 6101, Title 21 of the Delaware Code.

The State of Delaware or any agency, officer or employee of the State is not a party to the appeal and the provisions of 28 U.S.C. §2403(b) may be applicable.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT F. PIERCE and URSULA S. PIERCE,	)	
Plaintiffs Below Appellants,	)	No. 328, 1981
v.	)	
DONALD W. BIERER, JR., and DOVER VOLKSWAGEN, INC., a Delaware Corporation,	)	
Defendants Below, Appellees.	)	

Submitted: May 11, 1981
Decided: July 9, 1982

Before HERRMANN, Chief Justice, McNEILLY and QUILLEN, Justices.

Upon appeal from the Superior Court. Affirmed.

Joseph M. Bernstein (argued), Wilmington, for plaintiffs below-appellants.

Richard W. Pell and Jeffrey Marlin (argued), of Tybout, Redfearn, Casarino & Pell, Wilmington, for defendants below-appellees.

HERRMANN, Chief Justice:

In this appeal, the Court is asked to reconsider its decision in Justice v. Gatchell, Del. Supr., 325 A.2d 97 (1974), upholding the constitutionality of the Delaware Automobile Guest Statute [21 Del.C. § 6101 (a)].*

I.

The plaintiff, Robert Pierce, suffered injuries while a passenger in an automobile operated by the defendant Donald W. Bierer, Jr. and owned by Bierer's employer, defendant Dover Volkswagen, Inc. Pierce and Bierer were en route from a bar at 1:00 a.m. to a nearby restaurant. Their automobile was struck by a tractor-trailer.

A complaint was filed by Pierce alleging that the accident was caused by the ordinary

* 21 Del.C. § 6101(a) provides:
"§ 6101. Injury to nonpaying guest; exceptions as to passengers of public carriers and prospective purchasers of vehicles.
"(a) No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful or wanton disregard of the rights of others.

negligence or, in the alternative,"the wilful or wanton" conduct of Bierer. Defendants denied liability, pleaded as an affirmative defense the Guest Statute, and, following discovery, moved for summary judgment.

The plaintiff ultimately conceded both that he was a "guest without payment" under the Guest Statute and that his claim of "wilful or wanton" conduct was not substantiated by the facts. Thereupon, the Superior Court granted defendants summary judgment, citing Justice v. Gatchell, supra, in rejecting plaintiff's claim that the Guest Statute was unconstitutional.

II

In Justice, this Court considered the question of whether the Delaware Automobile Guest Statute is in contravention of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. This Court there carefully reviewed the various concepts under which the Guest Statute has been held to be in violation of the Equal Protection Clause in sev-

eral States, and found the question "fairly debatable." Exercising the judicial self-restraint in favor of the General Assembly, traditional in this State upon a "fairly debatable" conclusion as to the constitutionality of a State Statute (325 A.2d at 102), this Court held the Statute constitutional in Justice, stating:

> "If the Guest Statute has become unacceptably unwise and unfair under the current facts of life, it is for the General Assembly to act with respect to this Statute which it created more than 40 years ago. The wisdom of legislation is not within our realm; only the General Assembly may rectify legislation manifesting itself by hindsight as unwise . . . . For this Court to abolish the Guest Statute because of changed conditions would, in our view, amount to impermissible judicial legislation." 325 A.2d at 103.

The result in Justice was premised upon the proposition that the Connecticut Guest Statute had been upheld on equal protection grounds by the United States Supreme Court in Silver v. Silver, 280 U.S. 117 (1929), which still remained the last word by that Court on the subject.

The Plaintiffs contend that this Court should now abandon its position on the Guest

Statute in the light of what they view as a movement by the U.S. Supreme Court away from the "traditional" equal protection test previously applied by this Court in Justice on the basis of Silver. The plaintiffs argue that "the Supreme Court has redefined the role of the judicial branch vis-a-vis the legislature in passing on the constitutionality of statutes challenged under the 'traditional' equal protection test."

The plaintiffs further remind us of the comment in Justice: "If . . . the strictures of the Fourteenth Amendment [are to be] extended in this area of the law, we shall await the views of the United States Supreme Court on the subject. (325 A.2d at 102). Those views have been manifested, plaintiffs assert, in a number of recent cases all of which, they say, now require a reversal of Justice. Specifically, plaintiffs cite U.S.R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 101 S.Ct. 453 (1980); Minnesota v. Clover Leaf Creamery Company, 449 U.S. 456, 101 S.Ct. 715 (1981); Schweiker v. Wilson, 450 U.S. 221, 101 S.Ct. 1074 (1981); and Logan v. Zimmerman Brush Co., _____ U.S. _____, 102 S. Ct. 1148 (1982).

III.

We have reviewed the cited cases relied upon by the plaintiffs and find none to be controlling. None involves a Guest Statute of this or any other state and, therefore, cannot be said to bespeak a shift in the Supreme Court's viewpoint on the subject.

On the contrary, we find it significant that Silver, decided in 1929, still remains the last word by the U.S. Supreme Court on Automobile Guest Statutes in relation to equal protection rights. We find it quite significant that the U.S. Supreme Court, "for want of a substantial federal question," recently denied certiorari in connection with the Delaware Premises Guest Statute,* Bailey v. Pennington, 444 U.S. 1061,

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* The Premises Guest Statute, 25 Del.C. § 1501 provides: "§ 1501. Liability of owners or occupiers of land for injury to guests or trespassers.

"No person who enters onto private residential or farm premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was intentional on the part of the owner or occupier or was caused by the wilful or wanton disregard of the rights of others."

100 S.Ct. 1000 (1980), which was taken almost verbatim from the Automobile Guest Statute. The constitutionality of the Premises Guest Statute was upheld in Bailey v. Pennington, Del. Supr., 406 A.2d 44 (1979), in which an equal protection argument was rejected upon the basis of Justice.*

Accordingly, we find nothing has developed since Justice v. Gatchell to alter the stare decisis value of that case as to the constitutionality of the Automobile Guest Statute. We adhere to the rationale adopted and conclusions reached therein. If changes are to be made, the General Assembly must take the action.

* * *

Affirmed.

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* In Bailey, this Court again reminded all concerned:

"We remain convinced that the General Assembly, which created both of these Statutes [Automobile and Premises], must undo whatever evils or unfairnesses have arisen under them in modern day circumstances." 406 A.2d at 47.

STATE OF DELAWARE *
* SS.
KENT COUNTY *

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of Opinion decided July 9, 1982 in Pierce v. Bierer, No. 328, 1981, as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Dover this 21st day of September 1982, A.D.

/s/ T.E. Townsend Jr.
T. E. Townsend, Jr.
Clerk of the Supreme Court

SEAL

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROBERT F. PIERCE and URSULA S. PIERCE,	)	
Plaintiffs,	)	C.A. 80C-FE-63
v.	)	
DONALD W. BIERER, JR., and DOVER VOLKSWAGEN, INC., a Delaware Corporation,	)	
Defendants.	)	

Submitted: October 15, 1981
Decided: October 29, 1981

Joseph M. Bernstein, Esq.
Suite 820 Market Tower
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Richard W. Pell, Esq.
Tybout, Redfearn,
Casarino & Pell
P.O. Box 2092
Wil., DE 19899

On or about February 16, 1978, plaintiff, Robert Pierce and defendant Donald Bierer met in a bar at the Finish Line Tavern in Dover. They shared a pitcher of beer and then decided to go to a local restaurant for breakfast. They got into a car owned by Dover Volkswagen and operated by Bierer since he was a salesman for Dover Volkswagen. On the way to the restaurant the automobile was involved in an accident on

North State Street Extended. Plaintiff brings this action for damages.

The issue in this case is the constitutionality of the Guest Statute. Plaintiff agrees that he cannot substantiate the requirement of willful and wanton negligence. Therefore, he has attacked the constitutionality of the Guest Statute. As the Court stated at oral argument, this case is controlled by Justice v. Gatchell, Del. Supr., 325 A.2d 97 (1974). That case specifically dealt with the constitutionality of the Guest Statute. Plaintiff relied upon two additional cases, Minnesota v. Clover Leaf Creamery Co., 101 S.Ct. 715 (1981) and U.S.R.R. Retirement Board v. Fritz, 101 S.Ct. 453 (1980). The Court has reviewed these cases and finds that the factual allegations are completely opposite to the case in question and to the application of the Automobile Guest Statute.

Defendants Bierer and Dover Volkswagen's motion for summary judgment is therefore GRANTED.

/s/ VINCENT A. BIFFERATO

xc: Robert G.Carey, Esq.
Prothonotary, Law Library
Court Administrator, File

STATE OF DELAWARE *
* SS.
NEW CASTLE COUNTY *

I, GEORGE FISHER, Prothonotary of the Superior Court of the State of Delaware in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of Opinion decided October 29, 1981 in Pierce v. Bierer, C. A. 80C-FE-63, as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I, have hereunto set my hand and affixed the seal of said Court at Wilmington this 24th day of September , A.D. 1982.

/s/ George J. Fisher
GEORGE FISHER

(SEAL)

MANDATE

THE SUPREME COURT OF THE STATE OF DELAWARE

TO THE HONORABLE THE JUDGES OF THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

ROBERT F. PIERCE, ET AL.

vs. C.A. No. 80C-FE-63

DONALD W. BIERER, JR., ET AL

a certain judgment or order was entered on the 29th day of October, 1981 to which reference is made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on July 9, 1982, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it

is hereby affirmed.

WITNESS the Honorable D. L. Herrmann our Chief Justice, at Dover, the First day of January, A.D. 1982.

Issued July 30, 1982

Supreme Court No. 328, 1981

/s/ T.E. Townsend, Jr.
Clerk of the Supreme Court

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT F. PIERCE and URSUAL S. PIERCE,	)	
Plaintiffis Below, Appellants,	)	
v.	)	No. 328, 1981
DONALD W. BIERER, JR., and DOVER VOLSKWAGEN, INC., a Delaware Corporation,	)	
Defendants Below, Appellees.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To: T. Edgar Townsend, Jr.
Clerk of the Supreme Court
Supreme Court Building
Dover, Delaware 19901

Notice is hereby given that Robert F. Pierce and Ursula S. Pierce, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Delaware, which affirmed the granting of summary judgment of the Defendants Below, Appellees, entered in this action on July 9, 1982.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

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DATED: September 20, 1982

STATE OF DELAWARE *
* SS.
KENT COUNTY *

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing are true and correct copies of the Judgment [Mandate] entered by the Supreme Court of the State of Delaware July 30, 1982, and the Notice of Appeal to the United States Supreme Court filed on September 20, 1982 in Pierce v. Bierer, No. 328, 1981, as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I, have hereunto set my hand and affixed the seal of said Court at Dover this 21st day of September A.D. 1982

/s/ T.E. Townsend Jr.
T. E. Townsend, Jr.
Clerk of the Supreme Court

SEAL

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT F. PIERCE and URSULA S. PIERCE,	)	
Plaintiffs, Below,	)	
v.	)	No. 328, 1981
DONALD W. BIERER, JR., and DOVER VOLKSWAGEN, INC., a Delaware Corporation,	)	
Defendants Below, Appellees.	)	

PROOF OF SERVICE

AND NOW, this 20th day of September, 1982, I hereby certify that all parties required to be served have been served copies of the foregoing Notice of Appeal and that service was made on Appellees pursuant to U.S. Sup. Ct. Rule 28.3, 28 U.S.C.A. by mailing three copies via United States mail, with first-class postage prepaid, to Appellees counsel of record:

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANIELLE C. JUSTICE, et al,	)	
Plaintiffs Below Appellants,	)	No.
v.	)	
LOIS LORRAINE GATCHELL,	)	
Defendant Below, Appellee	)	

Argued: March 15, 1974
Decided: August 13, 1974

Before HERRMANN, C.J., DUFFY, J., and QUILLEN, Chancellor

Upon appeal from Superior Court. Affirmed.

James P. D'Angelo and William H. Bennethum, III, Wilmington, for Plaintiffs below-appellants.

Albert L. Simon, Wilmington, for defendant below-appellee.

HERRMANN, Chief Justice:

In this appeal, we are urged to strike down the Delaware Automobile Guest Statute [21 Del.C. § 6101(a)][1] as being in contravention of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

I.

This action involves injuries received by the minor plaintiff, Danielle C. Justice, in an automobile accident. The suit is brought on her behalf by her father who, together with his wife, has also brought suit in their own right. The defendant in the action is the grandmother of Danielle. At the time of the accident, Danielle was a passenger in an automobile

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1. 21 Del.C § 6101(a) provides:

"§ 6101 Injury to non-paying guest; exceptions as to passengers of public carriers and prospective purchasers of vehicles

"(a) No person transported by the owner or operator of a motor vehicle. * * * as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator, or was caused by his wilful or wanton disregard of the rights of others."

owned and operated by the defendant grandmother. The grandmother raised the Guest Statute as a defense. The plaintiffs moved for summary judgment asserting that the Guest Statute is inapplicable on the facts of the case and, in any event, is unconstitutional. The Superior Court denied the motion for summary judgment: this appeal by the plaintiffs followed.

The plaintiffs make three arguments. We address ourselves to the most important first.

II.

[1] The plaintiffs argue that the Delaware Automobile Guest Statute is violative of the Equal Protection Clause in that its denial of a cause of action to a non-paying guest injured through the negligence of the host driver, while permitting such a cause of action to a paying guest, establishes an arbitrary and invidious discrimination for which there is no rational basis. In support of that position, we are urged to follow Brown v. Merlo, 8 Cal.3d 855, 106 Cal.Rptr.

388, 506 P.2d 212 (1973). This has become the leading case in a new judicial trend inimical to Automobile Guest Statutes.

The present Delaware Automobile Guest Statute was enacted in 1933 (38 Del.L. Ch. 26).[2] At about the same time in the history of the evolution of the automobile, similar statutes were enacted in about half the States.[3] See 2 F. Harper and F. James, The Law of Torts, § 16.15, n.4 (1956).[4]

Over the years, almost universally until the advent of Merlo in 1973, Automobile Guest Statutes were upheld against constitutional at-

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2. It replaced 36 Del.L. Ch. 270, enacted in in 1929, which was declared unconstitutional in Coleman v. Rhodes, Del.Super., 5 W.W. Harr. 120, 159 A.649 (1932).

3. But not in our neighboring States of Maryland, Pennsylvania, or New Jersey.

4. Commentators have suggested that the chief argument for the creation of such statutes in the 1920's and 1930's was the protection of liability insurance companies against collusive litigation. See, e.g., Prosser, The Law of Torts § 34, p. 187 (4th Ed. 1971); White, The Liability of an Automobile Driver to a Non Paying Passenger 20 Va.L.Rev. 326, 332-333 (1934).

tack. Early in the game, our Guest Statute was brought under constitutional scrutiny in Gallegher v. Davis, Del. Super., 7 W.W. Harr. 380, 183 A. 620 (1936). It was there assailed as being violative of the "due course of law" provision of the Delaware Constitution, Art. 1, Sec. 9, Del.C.Ann.[5]. The holding in Gallegher, which has withstood the tests of time and challenge in this State, was that the Statute is constitutional. This conclusion was based principally upon Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929). In Gallegher, the Court had this to say as to the purpose and intent of the then recently-enacted Guest Statute of 1933:

> " * * *.[T]he history and language of the act indicates sufficiently the legislative belief that the multitudinous actions brought by guest passengers in

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5. Del. Const., Art. 1, Sec. 9, provides in pertinent part:
" *** every man for an injury done him in his reputation, person, moveable or immoveable possessions, shall have remedy by the due course of law."

> automobiles against owners and operators, not infrequently the parties, plaintiff and defendant, being near relatives, presented so many instances of collusion, utter indifference to results because of protective insurance, perjury and consequent fraud upon the courts, as to constitute a serious public evil to be mitigated by defining the degree of care to be required of an automobile host to a guest." (183 A.at 622)

Is is noteworthy that the attack in Gallegher was based upon the "due course of law" provision of the State Constitution and not upon the Equal Protection Clause of the Fourteenth Amendment. This case is of first impression here as a challenge of the Guest Statute on equal protection grounds.

The Silver case, relied upon in Gallegher, involved the Connecticut Guest Statute, much like ours, which was challenged on equal protection grounds. In Silver, it was stated that whether there had been a serious increase in the evils of vexatious litigation in automobile guest cases was for the Legislature to determine, and that the wisdom of legislation restricting liability in such cases was not the concern of the courts. The United States Supreme

Court upheld the Connecticut Statute in Silver stating:

> "In this day of almost universal highway transportation by motorcar, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the Legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. [Citations] It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs." (50 S.Ct. at 59)

This remains the last word of the United States Supreme Court on the subject.

On the authority of Silver, until Merlo, Guest Statutes like ours have been consistently upheld against constitutional challenges, including those founded upon the Equal Protection Clause: Roberson v. Roberson, 193 Ark. 669, 101 S.W.2d 961 (1937); Vogts v. Guerrette, 142 Colo. 527, 351 P.2d 851 (1960); Wrights Estate v. Pizel, 168 Kan. 493, 214 P.2d 328 (1950); Smith v. Williams, 51 Ohio App. 464, 1 N. E.2d 643 (1935); Perozzi v. Ganiere, 149 Or. 330, 40 P.2d 1009 (1935

Fulghum v. Bleakley, 177 S.C. 286, 181 S.E.30 (1935); Campbell v. Paschall, 132 Tex. 226, 121 S.W.2d 593 (1938); Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936); Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931); Pickett v. Matthews, 238 Ala. 542, 192 So.261 (1939); McMillan v. Nelson, 149 Fla. 334, 5 So.2d 867 (1942); Delaney v. Badame, 49 Ill.2d 168, 274 N.E.2d 353 (1971).

The Merlo case broke the pattern last year, reflecting a growing judicial impatience with, and disapproval of, Guest Statutes in general.. See cases collected at 2 Harper & James, The Law of Torts, § 16.-15, n.3 (Supp. 1968). In Merlo, the Supreme Court of California held that, under today's changing conditions, its Guest Statute denies equal protection of the laws, under both Federal and State Constitutions, to non-paying automobile guests. The rationale of Merlo is that the classifications which the Guest Statute creates, between those denied and those permitted recovery for negligently in-

flicted injuries,[6] bear no substantial and rational relation [7] to the Statute's traditionally recognized purposes of protecting the hospitality of host-drivers and of preventing collusive lawsuits. In rejecting the protection-of-hospitality justification, the Court cited such considerations as the greatly changed conditions since the 1930's arising from almost universal automobile liability insurance coverage. [8] In rejecting

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6. The distinctions being: (1) between gratuitous guests and paying passengers; (2) between automobile guests and other social guests; and (3) between different subclasses of automobile guests.

7. It is noted that the traditional equal protection "rationality" standard, and not the "strict scrutiny" standard, is applied in the testing of a Guest Statute against the Equal Protection Clause. See Brown v. Merlo, 106 Cal.Rptr. at 392, 506 P.2d at 216, n. 2; Tisko v. Harrison, Civ.App. Texas 500 S.W. 2d 565 at 571 (1973); Husband M. v. Wife M., Del.Supr., 321 A.2d 115 (1974).

8. "First, if the characterization of an injured guest's lawsuit as an act of 'ingratitude' ever had general validity, its rationality has been completely eroded by the development of almost universal automobile liability insurance coverage in recent years. Whereas, in the late 1920's and 1930's the statute's operation might realistically have been viewed as relieving most generous hosts from potentially great personal expense, today, with the widespread prevalence of insurance

the collusion-prevention thesis, the Court reasoned that in broadly prohibiting all automobile guests from instituting actions for negligence because a "small segment" of that class may file collusive suits, the Statute "presents a classic case of an impermissibly overinclusive [9.] classification scheme"; i.e., a statutory classification that "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims". The Court went on to say in this connec-

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coverage, it is the insurance company, and not the generous host, that in the majority of instances wins protection under the guest statute. Thus, in a day in which nearly 85 percent of automobile drivers carry liability insurance, the statute can no longer sequester the defense that it is a necessary means to thwart 'ungrateful' guests. In plain language, there is simply no notion of 'ingratitude' in suing your host's insurer." (106 Cal.Rptr. at 397, 506 P.2d at 221)

9. The theory is that "overinclusive classifications" are unreasonable classifications and violative of equal protection because they "fly squarely in the face of our traditional antipathy to assertions of mass guilt and guilt by association". Tussman & tenBroek, The Equal Protection of the Laws, 37 Cal.L.Rev. 341, 351-352 (1949); Note, Developments in the Law -- Equal Protection, 82 Harv.L. Rev. 1065, 1086-1087 (1969).

tion: "Instead of confirming its disability to those who actually institute collusive suits, the provision reaches out beyond such persons and burdens the great number of honest automobile guests"; and it said "Such a statute does not treat similarly situated individuals in like manner, but instead reaches out beyond the individuals 'tainted with the mischief' at which a statute is directed, and imposes its burden on innocent individuals who do not share the condemning characteristics"; and the Court concluded that " * * * in barring suits by all automobile guests simply to protect insurance companies from some collusive lawsuits, the guest statute exceeds the bounds of rationality and constitutes a denial of equal protection. (106 Cal.Rptr. at 403, 506 P.2d at 227-228).

These novel, scholarly, and thoughtful rationales and conclusions in Brown v. Merlo have aroused a spirited dichotomy and wide divergence of judicial opinion in the several cases in which Guest Statutes have been tested against the Equal Protection Clause since Merlo appeared.

The Court of Civil Appeals of Texas

unanimously declined to follow Merlo, and upheld the Texas Guest Statute. Tisko v. Harrison, Civ.App. Texas, 500 S.W.2d 565 (1973). The Supreme Court of Kansas, in a 4-3 decision, adopted the basic rationale and conclusion of Merlo, and held the Kansas Guest Statute violative of Federal and State equal protection constitutional guaranties. Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974). The Supreme Court of Utah declined to follow Merlo, and unanimously upheld the Guest Statute of that State against a similar equal protection assault. Cannon v. Oviatt and Martin, Utah Supr., 520 P.2d 883 (1974). The Supreme Court of Iowa, in a 5-4 decision, rejected the Merlo approaches to the problem and upheld the Iowa Guest Statute as constitutional under the Equal Protection Clause, Keasling v. Thompson, Iowa Supr., 217 N.W.2d 687 (1974). The Supreme Court of North Dakota, declining to test their Guest Statute under the Federal Constitution, but following the Merlo approaches, unanimously found their Statute violative of the "arbitrary classifications"

provision of the State Constitution in view of changing conditions occurring since the Statute's enactment in 1931. Johnson v. Hassett, N.D.Supr., 217 N.W.2d 771 (1974).

This contrariety of judicial opinion revolves basically around the question of whether the elimination of a Guest Statute, in the light of changing conditions, is within the realm of judicial action founded upon supposition and few facts, or whether it is more properly within the realm of legislative action founded upon empirical study.

It is clear from the learned but conflicting views appearing in the cases decided since Merlo that the question of the present constitutionality of a Guest Statute such as ours, under the Equal Protection Clause, is at least "fairly debatable".

[2-4] Having reached that conclusion, we become mindful of the traditional self-restraint of this Court whenever it becomes engaged in testing the constitutionality of an act of the General Assembly. Such self-imposed

limitation has been expressed by this Court in varying but consonant terms: Legislative acts should not be disturbed except in clear cases, and then only upon weighty considerations; a legislative enactment is cloaked with a presumption of constitutionality and should not be declared invalid unless its invalidity is beyond doubt. Klein v. National Pressure Cooker Co., Del.Supr., 31 Del.Ch. 459 64 A.2d 529 (1949). Every presumption is in favor of the validity of a legislative act and all doubts are resolved in its favor; and if the question of the reasonable necessity for regulation is fairly debatable, legislative judgment must be allowed to control. State v. Hobson, Del.Supr., 7 Terry 381, 83 A.2d 846 (1951). There is a strong presumption of constitutionality attending a legislative enactment which, unless the evidence of unconstitutionality is clear and convincing, the court will be reluctant to ignore. State Highway Dept. v. Delaware Power & Light Co., Del.Supr., 39 Del.Ch. 467, 167 A.2d 27 (1961).

One who challenges the constitutionality of a statute has the burden of overcoming the presumption of its validity. State v. Brown, Del.Supr., 195 A.2d 379 (1963).

[5] In the area of equal protection especially,courts have traditionally afforded legislative classifications a presumption of reasonableness and constitutionality where discrimination is not based upon race, color, religion, ancestry, or other "inherently suspect" classification requiring a more "strict scrutiny". 1 Antieau, Modern Constitutional Law § 8.81, p. 630 (1969). A statutory discrimination or classification will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Aetna Casualty & Surety Co. v. Smith, Del. Supr., 36 Del.Ch. 391, 131 A.2d 168 (1957).

Applying these tests: We are not persuaded that the evidence of unconstitutionality of the Guest Statute is "clear and convincing";

or that the appellants have succeeded in overcoming the presumption of its constitutionality and validity; or that no state of facts may reasonably be conceived to justify the statutory classification under present-day conditions.

We share the view upholding the constitutionality of Guest Statutes against the force of the Merlo rationale. If the rule of Silver, the highest present authority on the subject, is to be changed and the strictures of the Fourteenth Amendment extended in this area of the law, we shall await the views of the United States Supreme Court on the subject.

On the basis of the record before us, even on the basis of information of which we might take judicial notice, we are unable to say that there are no longer any evils to be corrected, or permissible objectives to be accomplished, by the Guest Statute. Whether the concept of hospitality-protection or collusion-prevention has been so eroded by changing conditions, as to have disappeared

as acceptable justification for the Guest Statute, is a problem more appropriate for legislative solution than for judicial determination. The General Assembly has access to relevant information bearing upon these matters more significant than any afforded this Court, bound as it is by the limitations of the record of this judicial proceeding.

[6,7] The balancing of intangibles, such as are involved in the Merlo approaches, is a proper legislative function. As to the collusion-prevention thesis, for example, the General Assembly must weigh the advantages of barring fraudulent guest claims against the disadvantages of also barring honest guest claims.[10] The balancing of competing advantages and disadvantages is also fundamentally a legislative function. If the Guest Statute has become unacceptably unwise and unfair under

10. An analogous problem is dealt with in the Statute of Frauds in which it is assumed that the advantage of barring fraudulent claims of certain classes of oral contracts outweighs the disadvantages of barring honest claims on such contracts.

current facts of life, it is for the General Assembly to act with respect to this Statute which it created more than 40 years ago. The wisdom of legislation is not within our realm; only the General Assembly may rectify legislation manifesting itself by hindsight as unwise. The appellants, and all who share increasing disillusionment with the Automobile Guest Statute under present conditions, must address themselves to the General Assembly. For this Court to abolish the Guest Statute because of charged conditions would, in our view, amount to impermissible judicial legislation.

Accordingly, we hold that the appellants have not shown the Delaware Automobile Guest Statute, even in its present day operation, to be in contravention of the Equal Protection Clause of the Federal Constitution.

III.

[8] The injured minor plaintiff in this case was six years old at the time of the accident.

The plaintiffs contend that a child of such tender years is incapable of being a "guest" within the meaning of the Guest Statute. The argument is that the word "guest" implies one who is offered and then accepts a free invitation from a host; that in order to accept such offer, the "guest" must be capable of knowingly accepting the invitation; and that a child six years of age is incapable of knowingly making the necessary consent. In support of that position, the plaintiffs cite Rosenbaum v. Raskin, 45 Ill2d 25, 257 N.E.2d 100 (1970); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971); and Plumley v. Klein, 31 Mich.App. 26, 187 N.W.2d 250 (1971). The defendant, in opposition, relies upon Lynott v. Sells, Del.Super., 2 Storey 385, 158 A.2d 583 (1958) and cases cited therein.

We do not reach the question of whether knowing acceptance of an invitation is always necessary to create a guest relationship.

The key fact here is that, at the time of the accident, the plaintiff child was riding

with the defendant grandmother with the express consent of the child's mother. We hold, as did the Superior Court in Lynott upon which the Court below relied, that where there is express consent by a parent, a child of tender years is subject to the provisions of the Guest Statute. Considering the purposes of the Statute, this is the better rule, and is the weight of authority. See Chancey v. Cobb, 102Ga.App. 636, 117 S.E.2d 189 (1960); Wood v. Morris, 109 Ga.App. 148, 135 S.E.2d 484 (1964); Favatella v. Poulsen, 17 Utah 2d 24, 403 P.2d 918 (1965); Whitfield v. Bruegel, 134 Ind.App. 636, 190 N.E.2d 670 (1963); Coleman v. Guarantee Reserve Life Ins. Co., 5 Cir., 337 F.2d 288 (1964); Horst v. Holtzen, 249 Iowa 958, 90 N.W.2d 41 (1958). To hold otherwise would be to deny the existence of a fundamental concept of our jurisprudence: that parently permission and consent may enable a minor to act legally. To hold otherwise would unjustly prevent recovery by an older sibling, while permitting recovery by the younger for the same negligence.

In so concluding, we understand, of course, the humane rationale of the decisions to the contrary upon which the plaintiffs rely. Because application of the Automobile Guest Statute so often results in harsh, unfair, and unreasonable results, courts have shown a general tendency to carve out exceptions to the operation of the Statute in the interest of justice. Our own courts have demonstrated that tendency. See, e.g. Engle v. Poland, Del.Super.,8 Terry 365, 91 A.2d 326 (1952); Robb v. Ramey Associates, Inc., Del.Super., 1 Terry 520, 14 A.2d 394 (1940); Truitt v. Gaines, D.Del., 199 F.Supp. 143 (1961). As a matter of policy, however, we do not favor further judicial creation of exceptions to the Statute. If, as many believe, the Delaware Automobile Guest Statute leads so often to unreasonable and unjust results and should be repealed forthwith, let its evils stand revealed to the General Assembly without further judicial effort to avoid a bad law by patchwork exceptions.

We conclude that there was no error below in holding the minor plaintiff subject to the Guest Statute.

IV.

[9] Finally, the plaintiffs contend that the benefit derived by the defendant grandmother, by reason of the companionship of the child, was sufficient to take the case out of the Guest Statute.

This is a classic example of the type of legal meandering often engaged in to bypass a Statute considered by many to be archaic and unjust. Of course, benefit to the driver is the crucial factor in determining whether a passenger in any given circumstance is a "guest without payment". Mumford v. Robinson, Del. Supr., 231 A.2d 477 (1967). But the intangible "benefit" asserted here is so ethereal as to merit no further comment.

* * *

Affirmed.

CERTIFICATE OF SERVICE

AND NOW, this 1st day of October, 1982, I hereby certify that all parties required to be served have been served copies of the foregoing Jurisdictional Statement and that service was made pursuant to U.S. Sup. Ct. Rule 28.3 by personal service, by delivery of three copies thereof to the following:

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-576

ROBERT F. PIERCE and URSULA S. PIERCE, Appellants

v.

DONALD M. REHNER, JR. and DOVER WOHNHEIGEN INC., a Delaware corporation, Appellees

ON APPEAL FROM THE SUPREME COURT OF DELAWARE

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-576

ROBERT F. PIERCE and URSULA S. PIERCE, Appellants

v.

DONALD W. BIERER, JR. and DOVER VOLKSWAGEN, INC., a Delaware corporation, Appellees

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ON APPEAL FROM THE SUPREME COURT

OF DELAWARE

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

May It Please The Court:

The Appellee moves the Court, pursuant to Supreme Court Rule 16, to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Delaware entered on July 9, 1982, on the ground that the question on which the decision depends does not present a substantial Federal question.

OPINION BELOW

The opinion of the Supreme Court of Delaware is reported at 447 A.2d 1189 and set forth in the Appellants' Appendix at p. 1a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendement to the Constitution of the United States:

> "...; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Delaware's "Automobile Guest Statute"[1], codified at 21 Del.C. §6101, which reads in pertinent part:

> "(a) No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury,

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1. Throughout this brief the statute will be referred to as the "Automobile" guest statute. The formal title is "Injury to nonpaying guest; exceptions as to passengers of public carriers and prospective purchasers of vehicles." 21 Del. C. §6101

death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful or wanton disregard of the rights of others."

QUESTION PRESENTED

Whether 21 Del.C. §6101 violates the due process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

This action stems from an automobile accident occurring on February 16, 1978, at the intersection of LaPores Private Drive and North State Street Extended (Business Route 13), Dover, Delaware.

Robert Pierce is a pharmaceutical salesman for American Cyanamid Company. He was in Dover to do an information call on the day of the accident. He stopped in at a local tavern at about 10:30 or 11:00 p.m. While at the tavern, he saw Donald Bierer. Mr. Pierce shared a pitcher of beer with Donald Bierer and one of Donald's working associates. At approximately one o'clock the party left the tavern to go to a local restaurant for breakfast. While in the parking lot, Donald Bierer offered to drive Robert Pierce to the restaurant and then back to his car.

From this point on, Robert Pierce remembers nothing. He remembers getting into Donald Bierer's car and he remembers awakening in the Emergency Room at Kent General Hospital. He has

spoken with Donald Bierer since the accident, and Donald informed him that in attempting to stop the car at a stop sign, the brakes did not hold on the ice and their car skidded onto North State Street Extended, where they were hit by a truck. Having known Bierer for ten years, Pierce had seen Donald drunk before and knows how he behaves when drunk. However, Bierer did not appear to be drunk at any time while they were together on the night of February 16, 1978. Robert Pierce consented to ride in the car provided for Mr. Bierer's use by Dover Volkswagen and driven by Mr. Bierer. However, at the time of this accident, Donald Bierer, Jr. was not driving the automobile involved as an agent, servant or employee of Dover Volkswagen.

Based on those facts, the Appellants filed a Complaint on February 12, 1980, alleging that the Appellee Bierer caused the accident by his negligence and/or wanton and willful misconduct.

On February 3, 1981, the Appellees, moved

for summary judgment on the basis, inter alia, of Delaware's Automobile Guest Statute, 21 Del.C. §6101. The plaintiff agreed that he could not substantiate the requirement of wanton and willful negligence. Therefore, he attacked the constitutionality of the Guest Statute. The argument was rejected by the Court below because of the Delaware Supreme Court's decision in Justice v. Gatchell, Del. Supr., 325 A.2d 97 (1974)[2] and, on October 29, 1981, the Superior Court of the state of Delaware granted the defendants' motion for summary judgment.[3]

An appeal was perfected to the Delaware Supreme Court which affirmed the lower Court under the rationale of Justice v. Gatchell.[4] This appeal followed.

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2 Appellants' Appendix, p. 17a
3 Appellants' Appendix, p. 9a
4 Appellants' Appendix, p. 1a

ARGUMENT

THE APPEAL SHOULD BE DISMISSED OR SUMMARILY AFFIRMED BECAUSE IT FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. THE APPELLANTS HAVE ASSUMED A HEAVY BURDEN IN SEEKING TO HAVE LEGISLATION ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE DECLARED UNCONSTITUTIONAL.

The police power of the State of Delaware i vested in its General Assembly which, within constitutional limits, is the sole judge as to when and how the police power of Delaware is to be exer cised for the protection and welfare of Delawarean A proper legislative determination as to the necessary exercise of that police power and the method to be employed is conclusive upon the court Silver v. Silver, 143 A. 240, affirmed 280 U.S. 117 (1929); Clendaniel v. Conrad, Del. Supr., 83 A. 1036, error dismissed 235 U.S. 712 (1929). In Ferguson v. Skrupa, 372 U.S. 726, 730 (1963), the court stated the general rule that courts may not substitute their social and economic belief for the judgment of the legislature:

> "We have returned to the original constitutional proposition that courts

> do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this court stated in a unanimous opinion in 1941, 'We are not concerned ... with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our governmental and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs... " (footnotes omitted)

Likewise, the court in Schweiker v. Wilson, 450 U.S. 221, 234 (1981), stated that even on the justification of the Equal Protection Clause, the court may not "substitute [its] personal notions of good public policy for those of Congress."

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). But, so too, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Tigner v. Texas,

310 U.S. 141, 147 (1940). The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States:

> "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accomodate competing concerns, both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." Plyler v. Doe, 102 S. Ct. 2382, 2394 (1982)

In Williamson v. Lee Optical Co. of Oklahom 348 U.S. 483, 489 (1955), this Court, with respect to equal protection, said:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the Legislature may think."

The reason for such judicial self-restraint is found in Vance v. Bradley, 440 U.S. 93, 97 (1979), wherein the court noted that unless there is cause to infer antipathy, the Constitution presumes that judicial intervention is unwarranted

because unwise laws will be rectified by the democratic processes:

> "The Constitution presumes, that absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic processes and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational...and thus that the section is valid if it is 'rationally related to furthering a legitimate state interest.'" (emphasis added)

Thus, courts may not delegate to themselves legislative power and authority to determine statutes unconstitutional by "modern" standards under "present day" conditions in an over-zealous effort to effect perceived long-overdue reform. Keasling v. Thompson, Iowa Supr., 217 N.W.2d 687 (1974). See also "Judicial Nullification of Guest Statutes", 40 S.Cal.L.Rev. 884 (1968). Nor is it necessary that the Court agree that the statute is a wise, sound and appropriate public policy. McGowan v. Maryland, 366 U.S. 420 (1961).

The primary function and responsibility of Delawar General Assembly is, in its wisdom, tc weigh and determine the desirability of legislation affecting the social, economic and political policy of the State. "Misguided laws may nonetheless be constitutional." James v. Strange, 407 U.S. 128 (1972).

In challenging Delaware's automobile guest statute, the appellants have assumed a heavy burden. Hodel v. Indiana, 452 U.S. 314 (1981). Every legislative act is presumed constitutional, and any question of its validity must be resolved in favor of the statute, especially where the alleged discrimination is not based on race, color, religion, ancestry or financial position. Id; Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959).

The creation of distinct classification of persons is not denied the legislature by the Equal Protection Clause and a scheme of classification is permissible if any state of facts can be conceived reasonably to sustain it. Clements v. Fashing, 102 S.Ct. 2836 (1982);

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, rehearing denied, 450 U.S. 1027 (1981); U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, rehearing denied, 450 U.S. 960 (1980).

In short, it is settled that a statute must be held valid if it is possible for the court to do so; every presumption must be resolved in favor of the statute's validity; and the court must not be concerned with the wisdom of the object the General Assembly of the State of Delaware sought to accomplish. Clements v. Fashing, supra; Schweiker v. Wilson, supra; Hodel v. Indiana, supra.

Equally applicable here is the court's admonition in Clements v. Fashing, supra, that this court is not authorized to review the manner in which a State has decided to govern itself, nor the wisdom of its legislative provisions:

> "Neither the Equal Protection Clause nor the First Amendment authorizes this court to review in cases such as this the manner in which a State has decided to govern itself. Constitutional limitations arise only if the classification scheme is invidious or if the challenged provision significantly impairs interests

protected by the First Amendment. Our view of the wisdom of a state constitutional provision may not color our task of constitutional adjudication." 102 S.Ct. at 2848.

B. THIS COURT CAREFULLY CONSIDERED THE CONSTITUTIONALITY OF AN AUTOMOBILE GUEST STATUTE IN SILVER V. SILVER AND UPHELD ITS CONSTITUTIONALITY, SPECIFICALLY REJECTING THE CONTENTION THAT THE STATUTE DENIED EQUAL PROTECTION RIGHTS; THUS STARE DECISIS APPLIES AND THE COURT NEED NOT CONSIDER THE STATUTE'S CONSTITUTIONALITY IN THIS ACTION.

Appellants ask this court to reconsider its previous decision upholding the constitutionality of the automobile guest statute. In 1929, this court was called upon to rule on the constitutionality of Connecticut's guest statute. Silver v. Silver, 280 U.S. 117 (1929). In that case, the court carefully considered the constitutionality of the automobile guest statute and upheld its constitutionality, specifically rejecting the contention that the statute denied equal protection rights. For this court to take the position now that the guest statute violates the Equal Protection Clause would be to ignore past decisions and to reject the principle of stare decisis. For, in the absence of a clear indication that a law applied earlier in history is wrong, a rule of law long acquiesced in and relied upon in commercial and business

practice should not be overthrown except for compelling reasons of public policy or imperative demands of justice. United States v. Maine, 420 U.S. 515 (1975).

The court in Hudgens v. N.L.R.B., 424 U.S. 507, on remand, 531 F.2d 1342 (5th Cir. 1976) noted the duty of the court as follows:

> "Our institutional duty is to follow until changed the law as it now is, not as some members of the court might wish it to be." 424 U.S. at 518.

The doctrine of stare decisis imposes a severe burden on the litigant who asks the court to disavow one of its precedents. For that doctrine not only plays an important role in orderly adjudication, it also serves the broader societal interests in even-handed, consistent, and predictable application of legal rules. Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980), affirmed on rehearing, 649 F.2d 275 (5th Cir. 1981).

The court in Moragne v. States Marine Lines Inc., 398 U.S. 375, 403 (1970) listed some of the "weighty considerations" which underlie the principle that courts should not lightly overrule past decisions:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise, the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

The United States Supreme Court has refused to reconsider its early holding that a Connecticut guest statute, similar to Delaware's, did not violate the Equal Protection Clause. Several times in the past decade, the court has been asked to consider whether a state or federal court had correctly determined that a guest statute did not violate the Equal Protection Clause. On each occasion, the court declined to grant plenary consideration of the question. Silver v. Silver, supra, was re-affirmed by the United States Supreme Court in the case captioned Sidle v. Majors, 536 F.2d 1156 (7th Cir.), cert. denied, 429 U.S. 945 (1976). Sidle involved

a challenge to the Indiana guest statute based upon equal protection grounds. Upon certification to the Indiana Supreme Court from the United States Circuit Court of Appeals, 7th circuit, the state court ruled that the statute is not violative of the Indiana Constitution. In denying the petition for certiorari in Sidle, t Supreme Court reached the merits by summary disposition.

In White v. Hughes, Ark. Supr., 519 S.W. 2d 70, appeal dismissed, 423 U.S. 805 (1975) and Cannon v. Oviatt, Utah Supr., 520 P.2d 883, appeal dismissed, 419 U.S. 810 (1974) and Hill v. Garner, 277 Or. 641, 561 P.2d 1016, appeal dismissed 434 U.S. 989 (1977), the issue was presente by means of appeal. The court nevertheless dismissed the appeals in those three instances for want of a substantial federal question, thus ruling on the merits of the equal protection issue Hicks v. Miranda, 422 U.S. 332 (1975).[5]

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5 As recently as 1980, the court has ruled on an analogous issue by dismissing the appeal from Bailey v. Pennington, Del. Supr., 406 A.2d 44 (1979), appeal dismissed, 444 U.S. 1061 (1980), on the issue of the constitutionality of Delaware's premises guest statute

The appellants would relegate the Silver opinion to the status of outmoded law because it does not meet today's equal protection classification based upon the standard of rationality as set forth in Schweiker v. Wilson, supra. It is our view that these cases, along with numerous decisions of other state supreme courts, clearly refute the appellants' contentions. Beasley v. Bozeman, Ala. Supr., 315 So.2d 570 (1975); Huydts v. Dixon, Colo. Supr., 606 P.2d 1303 (1980); Justice v. Gatchell, Del. Supr., 325 A.2d 97 (1974); Bickford v. Nolen, 240 Ga. 255, 240 S.E. 2d 24 (1977); Delany v. Bedame, 49 Ill.2d 168, 274 N.E.2d 353 (1971); Brady v. Acs, Ind. Supr., 342 N.E.2d 837 (1976); Keasling v. Thompson, supra; Botsch v. Reisdorff,193 Neb. 165, 226 N.W. 2d 121 (1975); Duerst v. Limbocker, Or. Supr., 525 P.2d 99 (1974); Behrns v. Burke, S.D. Supr., 229 N.W.2d 86 (1975); Tisko v. Harrison, Tex. App., 500 S.W.2d 565 (1973).

For these reasons, this court should reject appellants' argument that the constitutionality of Delaware's automobile guest statute presents a substantial federal question.

C. THE SUPREME COURT OF DELAWARE APPLIED THE PROPER EQUAL PROTECTION STANDARD OF REVIEW

Appellants on this appeal urge the court to declare Delaware's automobile guest statute an unconstitutional denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. They urge such a result because of an alleged change in the statement and application of the rational basis test as advanced in Schweiker v. Wilson, supra, and Clements v. Fashing, supra. In fact, the rational basis test has not changed since the days of Silver v. Silver, supra, and the Supreme Court of Delaware, in upholding the validity of the guest statute on the basis of Silver and Justice v. Gatchell, supra, applied the proper equal protection standard of review.

In advocating the position that the traditional rational basis test was not set forth correctly in Silver v. Silver, supra, and Justice v. Gatchell, supra, but was stated correctly in Schweiker v. Wilson, supra, and

Clements v. Fashing, supra, the appellants fail to take into account the fact that the court has employed numerous formulations for the rational basis test because the members of the court continue to hold divergent views on the clarity with which a legislative purpose must appear and about the degree of deference afforded the legislature in suiting the means to the ends. Schweiker v. Wilson, supra; U.S. Railroad Retirement Board v. Fritz, supra. Justice Powell, in his concurring opinion in Logan v. Zimmerman Brush Co., 102 S.Ct. 1148, 1162 (1982), stated that consistency of language in the equal protection cases is an ideal unlikely to be achieved:

> "It is necessary for this court to decide cases during almost every term on due process and equal protection grounds. Our opinions in these areas often are criticized, with justice, as lacking consistency and clarity. Because these issues arise in varied settings, and opinions are written by each of nine Justices, consistency of language is an ideal unlikely to be achieved."

That the enunciation of the rational basis test in Schweiker v. Wilson, supra, is no more correct than that of Silver v. Silver,

supra, is apparent after a reading of one of the latest decisions in that area: Clements v. Fashin supra. That court held that a statute would be ruled unconstitutional on equal protection grounds only if no grounds could be conceived to justify the State's goals in enacting the legislation:

> "The Equal Protection Clause allows the State considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them....We have departed from traditional equal protection principles only when the challenged statute places burdens upon 'suspect classes' of persons or on a constitutional right that is deemed to be 'fundamental.'" (emphasis added) 102 S.Ct at 2843.

Employing the same standard when the constitutionality of a Minnesota statute banning plastic nonreturnable milk jugs was challenged, the court in Minnesota v. Clover Leaf Creamery

Co., supra, noted that the State had identified four reasons why the classification between plastic and nonplastic nonreturnables was related to the statutory purpose and that as long as "any one of the four substantiates the State's claim, we must reverse the Minnesota Supreme Court and sustain the Act." 450 U.S. at 724.

The court went further to state that although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, "they cannot prevail so long as 'it is evident from all the considerations presented [to the legislature], and those of which we may take judicial notice, that the question is at least debatable.'..." Id.

Finally, in Fritz, supra, the court noted that while the equal protection cases are neither uniform nor consistent, the court was "obliged to apply the equal protection component of the Fifth Amendment as we believe the Constitution requires." The court went further to state that when social or economic considerations are involved, the proper application of the equal

protection test is set forth in Dandridge v. Willi
infra, Jefferson v. Hackney, 406 U.S. 535 (1972)
and the case under consideration:

> "But like our predecessors and our successors, we are obliged to apply the equal protection component of the Fifth Amendment as we believe the Constitution requires and in so doing we have no hesitation in asserting, contrary to the dissent, that where social or economic regulations are involved Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), and Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972), together with this case, state the proper application of the test. The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion." U.S. Railroad Retirement Board v. Fritz, 101 S.Ct. 460, n.10.

The Fritz court likewise recognized that t
court had not in earlier cases been altogether consistent in its pronouncements in the equal protection area. The court noted that in recent years, it had consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn, citi
from Dandridge v. Williams, 397 U.S. 471, 485 (1970):

"In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' ...'The problems of government are practical ones and may justify, if they do not require, rough accomodations--illogical it may be, and unscientific.'...'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'

'[The rational basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.'..."

In Justice v. Gatchell, supra, the Delaware Supreme Court applied the rational basis test, taking into account the different enunciations of the standard:

"Applying these tests: We are not persuaded that the evidence of unconstitutionality of the guest statute is 'clear and convincing'; or that the appellants have succeeded in overcoming the presumption of constitutionality and validity; or that no state of facts may reasonably be conceived to justify the statutory classification under present-day conditions." 325 A.2d at 102.

In Pierce v. Bierer, Del. Supr., 447 A.2d 1189 (1982), the Supreme Court of Delaware found that nothing had developed since Justice v. Gatchell, supra, to change the rationale adopte and conclusions reached in that case. Implicitly, then, the court has been presented with no evidenc to show that the legislative facts on which the nonpaying guest classification is apparently based could not reasonably be conceived to be true by the legislators.

As such, in light of the latest string of pronouncements of the rational basis test, it becomes apparent that there has been no actual change in the application of the rational basis test. As such, the court's reliance on Justice v. Gatchell is justified. In practice, if the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The Supreme Court has said that it will not invalidate on equal protection grounds legislation that it simply deems unwise or unartfully drawn. U.S.

Railroad Retirement Board v. Fritz, supra.

Where there are plausible reasons for the legislature's action, the court's inquiry is at an end. U.S. Railroad Retirement Board v. Fritz, supra. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision" because the United States Supreme Court has never insisted that a legislative body articulate its reasons for enacting a statute. Flemming v. Nestor, 363 U.S. 603, 612, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435 (1960). "This is particularly true where the legislature must necessarily engage in a process of line drawing....[A]nd the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." U.S. Railroad Retirement Board v. Fritz, supra, 101 S.Ct. at 461. Thus, the equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is not an obligation to provide the best governance possible. Schweiker v. Wilson, 450 U.S. 221, 101 S.Ct. 1074 (1981). This is a necessary

result of different institutional competences, and its reasons are obvious. Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, this court exercises only a very limited review power over the legislature, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems. At the minimum level, this court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.

Thus, then, under the latest case law, the pertinent inquiry is still whether the classification employed advances legitimate legislative goals in a rational fashion, the cases citing for support Dandridge v. Williams, supra. The rational basis standard, though does not allow the court to substitute its personal notions of good public policy for those of the legislature and in fact, "a statutory

discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Id. at 397 U.S. 501. Accord, Aetna Casualty and Surety Co. v. Smith, Del. Supr., 131 A.2d 168 (1957).

The United States Supreme Court has also said: "This inquiry employs a relatively relaxed standard reflecting the court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible, nor necessary. Schweiker v. Wilson, supra, 101 S.Ct. at 1083, citing Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314. As long as the classificatory scheme rationally advances a reasonable and identifiable governmental objective, the court must disregard the existence of other methods of allocation which it, as individuals, perhaps would have preferred. Id.

The courts are limited under constitutional mandate to limit the legislature to its lawful territory of prohibiting legislation which, although enacted under the claim of a

valid exercise of the police power, is unreasonable and oppressive. Nevertheless, the court must recognize that the legislature is vested with a wide latitude of discretion in determining public policy:

> "But we reiterate that 'it is up to legislatures, not courts, to decide on the wisdom and utility of legislation,'..." Minnesota v. Clover Leaf Creamery Co., supra. at 726.

Therefore, every statute is clothed with the presumption of constitutionality and such presumption continues until clearly overcome by a showing to the contrary. Id. States are not required to convince the courts of the correctness of their legislative judgments. "Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker," Id, at 724, so that if the Delaware General Assembly could rationally have decided that the guest statute would increase hospitality or decrease the number of collusive

suits brought, or the issue is clearly debatable, the validity of the guest statute must be upheld. Id. So, if it is possible for the court to construe the guest statute that it will meet the test of constitutionality, it not only may, but should and must do so.

D. THE CONCEPT OF HOST PROTECTION IS A RATIONAL JUSTIFICATION FOR THE GUEST STATUTE

The Delaware Automobile Guest Statute, 21 Del.C. §6106, provides in pertinent part as follows:

> (a) No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful or wanton disregard of the rights of others."

Our automobile guest statute precludes a nonpaying guest passenger from recovering damages for personal injuries sustained by the ordinary negligence of the owner or operator. Recovery for wanton or willful negligence is allowed. Because clearly two classifications of passengers are made--guests and paying passengers--and because each class may be treated differently in identical situations, the inequity is patent. The issues are whether or not the classification is reasonable and bears

a fair and substantial relationship to the legitimate purpose of the statute. The presumptions are that it is and does, and the burden is upon the appellants to show the contrary.

In determining if our statute bears a fair and substantial relationship to the purpose for which it was enacted, its purpose must first be ascertained. The purposes traditionally attributed to automobile guest rules and statutes have been the fostering of hospitality by insulating generous hosts from lawsuits instituted by injured guests and the elimination of collusive lawsuits.

The legislature could and did act reasonably by differentiating between standards of care owed on the basis of compensation paid and in so doing, did not present a question of invidious discrimination. The Delaware statute does not distinguish between automobile guests and all other guests, but operates equally for guests in boats, airplanes, motor vehicles and other vehicles. Furthermore, this classification of an invited guest made in the automobile guest

statute extends throughout other areas of Delaware law. Because there is the same standard with regard to the duty owed by the Delaware landowner to his business invitees and to his licensee and the duty owed to a bailor by a gratuitous bailee or a bailee for hire, the automobile guest in this jurisdiction is not placed in a distinct classification where he alone as a recipient of generosity is deprived of the duty of due care by his host. Since the distinction between the duties owed to social guests and business invitees, and by gratuitous bailees and bailees for hire is thus recognized in other contexts, the question is whether it is irrational when considered in relation to the purpose of the guest statute. It is not an irrational, but rather, a very rational distinction because it provides the test for determining whether hospitality has been extended by the host to his guest. Bickford v. Nolen, supra; Duerst v. Kimbocker; supra; Tisko v. Harrison, supra.

Such argument as advanced by the appellants was refuted in Silver v. Silver, supra, and it

was held that the legislature is not held rigidly to a choice of regulating all or none, but that it is sufficient if it strikes at an evil where it most frequently occurs. In Silver, the principle contention was that the Connecticut guest statute made an unreasonable distinction between a guest in an automobile and a guest in any other mode of transportation or in any other place, thus depriving him of the equal protection of the law. Rejecting this contention, the Connecticut Supreme Court recognized the automobile as a proper basis for the legislative classification in that it had a fair and substantial relation to the legislative object of control and regulation of traffic on public highways.

The court held that the legislature acted well within the limits of police power in making a distinction between the degree of care to be exercised by the owner or operator of a motor vehicle toward a guest and that to be exercised toward one who pays for transportation. The court stated that such a distinction ran through many fields of law and thus, the court saw inherent

justice in the rule that one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay.

On appeal to the United States Supreme Court, the judgment was affirmed. Writing for a unanimous court, Mr. Justice Stone observed that whether there had been a serious increase in the evils of vexatious litigation in automobile guest cases was for the legislature to determine, and that the wisdom of the legislation restricting liability in such cases is not the concern of courts.

In response to the argument that no grounds existed for a distinction between gratuitous passengers in automobiles and those in other classes of vehicles, the court said:

> "In this day of almost universal highway transportation by motorcar, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. ...It is enough that the present statute strikes at the evil where

it is felt and reaches the class where it most frequently occurs." 280 U.S. at 123-124.

Equally as true in Delaware as in Connecticut, the use of the motor vehicle upon the public highways has been validly subjected to legislative regulation. The presence of the guest in this area would itself create a basis for a distinct classification from other guests located where there was no overwhelming public interest. The motor vehicle exerts a dominate influence in contemporary society and its use creates many economic and social problems. In Delaware, where a significant portion of our economic resources are devoted to the construction and maintenance of highways, and where the economic burden bears a direct relationship to the number of vehicles and the total cumulative mileage on the highways each year, it would be ludicrous to suggest that the guest statute is not rationally based when it promotes the conservation of petroleum and other natural resources consumed in highway travel and encourages hospitality, which directly affects the

number of vehicles present on the highways, thus avoiding traffic congestion and wear to the surfaces of the roadway. Botsch v. Reisdorff, supra; Cannon v. Oviatt, supra.

Furthermore, while it can be argued that wide-spread insurance coverage has negated the hospitality rationale, this does not take into account that the guest's claim need not be limited to the host's liability insurance coverage or that a host who find himself liable in a tort action risks the possibility of a cancellation of his insurance or a substantial increase in his premiums or that a host may be uninsured. Bickford v. Nolen, supra; Botsch v. Reisdorff, supra; Duerst v. Limbocker, supra. In Delaware, statutorily required policy limits are relatively low. See 21 Del.C. §2118(a). Moreover, the fact that a significant number of drivers do not have any liability insurance is evident by the No Fault Act which requires uninsured motorist coverage to be offered in automobile liability insurance policies. Botsch v. Reisdorff, supra.

In addition, the presence of liability insurance goes only to the need for protection from ungrateful guests. In fact, liability insurance is similarly a policy decision. The suggestion that the burden of the injured guest should be borne by the motoring public through liability insurance is an economic and social solution that is subject to legislative determination. The policy question of who should bear the loss (guest or rest of motoring public) is properly to be decided by the legislature. The No Fault Act provides a compromise, the guest receiving limited compensation for injuries, while hospitality is encourgaged by not exposing the host to unlimited liability and staggering insurance rates. Cannon v. Oviatt, supra. The appellants' suggested simplistic solution that the motoring public should bear the costs of the injured guests ignores the economic consequence that increased claims will be reflected in increased insurance rates, creating an economic hardship not only on the generous host, but on the driving public

and thus, chilling hospitality:

> "...Liability insurance is widely prevalent today. In few cases will the [elimination of the guest statute] shift the burden of loss from the injured guest to the negligent host personally. In the great majority of cases it will shift part or all of the burden of loss from the injured individual to the motoring public. ..." (emphasis supplied) McConville v. State Farm Mutual Automobile Ins. Co., Wis. Supr., 113 N.W.2d 14, 19 (1962).

Also present is the inherent assumption that the indignation normally felt by a host for a guest's ingratitude does not arise where the host suffers no monetary loss because his insurer is sued. Botsch v. Reisdorff, supra; Duerst v. Limbocker, supra. Notwithstanding that there may be no direct financial loss arising from it, a lawsuit is not an experience which endears the guest to the host. As the court in Chaplowe v. Powsner, Conn. Supr., 175 A. 470 (1934) stated:

> "As the use of automobiles became almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counter part in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often

> turned upon close questions of negligence. Undoubtedly, the Legislature, in adopting this act, reflected a certain natural feeling as to the injustice of such a situation."

It is prerogative of the legislature to use prescriptive legislation to foster or perpetrate standards of moral or ethical conduct generally accepted as a part of the mores of the community so long as they do not involve invidious categories or fundamental interests. In order to declare the guest statute unconstitutional, the court must be prepared to say that none of the herein articulated reasons would support greater hospitality and that the court, rather than the legislature, can better discern the community standard of morality. This is plainly presumptuous and contrary to the court's often pronounced pledge of judicial self-restraint. Although these reasons may not be absolute, they are strongly persuasive and they do satisfy the test of equal protection. The classifications of guest passenger and paying passenger bear a fair and substantial relation to a valid purpose of the guest statute.

Any final determination of values should be left to the legislature.

E. THE OBJECTIVE OF PREVENTIVE COLLUSIVE LITIGATION IS A RATIONAL JUSTIFICATION FOR THE GUEST STATUTE.

It is the appellants' contention that the distinction between passengers who pay for their ride and those who ride gratuitously cannot be justified by the recognized state policies underlying the Delaware Guest Statute, 21 Del.C. §6101. The appellants argue that the protection of hospitality cannot support these distinctions because the prevalence of liability insurance renders such considerations irrelevant. However, another primary purpose of the statute is the prevention of fraud on liability insurers. If automobile liability insurance is now more nearly universal than it was when the statute was enacted, the potentiality for collusion between owners and/or drivers and guest is even greater now than it was then.[6] It is reasonable to assume that an injured guest and an agreeable

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6 It should be noted that over half of the states which have upheld the constitutionality of the automobile guest statute have enacted a scheme of no-fault insurance: Arkansas, Colorado, Delaware, Georgia, Oregon, South Dakota, Texas and Utah.

host may be anxious to see compensation paid so long as the host does not have to pay it. They could even conspire against an insurer so that the truth will not known. Here again we must defer to legislative judgment. That the rule may also bar some claims is not a sufficient ground to hold the guest passenger classification as violative of the Equal Protection Clause.

This court should not accept the appellant condemnation of the guest statute as an impermissibly overinclusive classification scheme. The appellants argue that in broadly prohibiting all automobile guests from instituting actions for negligence because a small segment of that class may file collusive suits, the statute burdens a wider range of individuals than are included in the class of those tainted with the mischief at which the law is aimed. The appellants contend that instead of confining the disability to those who actually institute collusive suits, the statute reaches out beyond such persons and burdens the great number of honest automobile guests. The effect

of that position seems to be that legislation denying recovery for ordinary negligence must be limited to guest claims shown to be actually collusive. No allowance is made for the difficulty of detecting collusion between an insured owner or operator and his guest or for the even greater difficulty of establishing it to the satisfaction of a jury. Of course, legislation limited to litigation in which collusion can be proved would be superfluous because such proof in itself would be sufficient in most cases to defeat an action based on ordinary negligence. The purpose of the statute is to prevent collusion that is not so easily exposed. Tisko v. Harrison, supra. Since no method is available to identify collusive guest suits, the legislature cannot possibly draw a statute so narrowly and precisely as to apply only to cases of actual collusion.

In order to deal with the problem at all, the legislature must weigh the advantage of barring fraudulent guest claims against the disadvantage of also barring honest guest claims.

This balancing of intangibles is a proper legislative function. An analogous problem is dealt with in the Statute of Frauds, which assumes that the advantages of barring fraudulent claims on certain classes of oral contracts outweigh the disadvantages of barring honest claims on such contracts. Likewise, Delaware disallows suits by a wife against her husband or her husband's employer, one of the reasons being to promote the public policy of prevention of fraud upon insurance companies. Fields v. Synthetic Ropes, Inc., Del. Super., 211 A.2d 617 (1965). As such, the guest statute does not create a distinct classification for automobile guests as compared to others insofar as collusive lawsuits are concerned, but rather indicates that the legislature has taken strong measures to protect society from the fraudulent few. The wisdom of that sort of decision is exactly what makes this a legislative, rather than a judicial decision. As the court in Sidle v. Major, supra at 770, 771, noted:

> "We think it no constitutional infirmity that a statute may not operate to perfection, if it may

> reasonably be expected to operate effectively. We do not agree with the California Court that the classifications are so over-inclusive as to defy notions of fairness or reasonableness. ... We acknowledge an 'overbreadth' in our guest statute, in that those with bona fide damage claims are caught in the same net with the would-be collusive and fraudulent. However, we perceive no reasonable alternative. There is no way, short of full-blown litigation--the very evil the act is designed to avert--that the bona fides of the plaintiff's claim could be determined."

The notion of impermissible over-inclusiveness has been held to have no place in the equal protection analysis of social and economic regulations not affecting freedoms guaranteed by the Bill of Rights. In Dandridge v. Williams, supra, it is stated as follows:

> "For this court to approve the invalidation of state economical or social regulation as 'overreaching' would be far too reminiscent of an era when the court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with particular school thought,' ... That era long ago passed into history. ..."

It is mere speculation to say that few guests act collusively. Furthermore,

there is no responsible data available, or the plaintiff has supplied us with none, on whether the majority of automobile guests are honest or not. As the court stated in Tisko v. Harrison, Tex. App., 500 S.W.2d 565, 572 (1973), "we have no reliable information concerning the extent of the evil which prompted enactment of the statute," nor do we have reliable information that the evil originally seen by the legislature no longer exists.

As in other areas, including the various classes of cases in which separate burdens of proof are judicially required, it is a reasonably conceived ground for the legislature to determine that the temptation or actual incidence of fraud is very great; or that collusion is expecially difficult to detect; or that the judicial system should not be responsible for having to detect fraud. A legislature or a court is reasonably justified in believing that the alternative of requiring a higher degree of proof in automobile guest cases, for example requiring a standard of clear and

conclusive evidence instead of a preponderance of the evidence, is a definite factor in controlling the problem of collusive lawsuits and losses. There is little difference between an acknowledged power by judicial decision or legislation to invoke a higher degree of proof of a higher degree of negligence.

More recent decisions agree that an underinclusive classification is not necessarily a fatal defect unless the legislation involves a suspect classification or a fundamental interest. Only in those areas is a legislative classification subject to strict scrutiny. Tisko v. Harrison, supra. The underinclusive argument--that the legislation excludes some who should be included--has been discredited by the United States Supreme Court in other circumstances on numerous occasions. In Railway Express Agency v. New York, 336 U.S. 106, 110 (1949), it was held that a city regulation which prohibits advertising trucks on the city streets, but which permits the owner of a business to advertise his own wares on his own trucks was not

a violation of equal protection. In noting that all evils of the same kind need not be cured, the court stated:

> "And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."

In a separate concurring opinion, Justice Jackson said:

> "It is rather because there is a real difference between doing in self interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price.
>
> "Certainly the presence or absence of hire has been the hook by which much highway regulation has been supported. Rights usual to passengers may be denied to the nonpaying guest in an automobile to limit vexatious litigation. Silver v. Silver, supra, 336 U.S. at 115, 69 S.Ct. at 468, 93 L.Ed. at 541."

In Williamson v. Lee Optical Co. of Oklahoma, 348 U.S. 483, 489 (1955), the court emphasized that the law need not be consistent

with its aims in every respect, but that it is enough if the legislature saw the law as the rational way to correct a particular evil:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. ... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. ...The legislature may select one phase of one field and apply a remedy there, neglecting the others. ...The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

When courts intervene to take such basic decisions from the legislative body whose right and duty it is to make them, they delegate to themselves power which is not theirs and authority which resides in the legislature. In other words, the fact that a statute includes more persons or fewer within its sweep than those who fit the pattern which the statute was designed to catch does not invalidate a law. Even if a classification involved here is to some extent both underinclusive and overinclusive and thus, the line drawn by the

General Assembly imperfect, it is nonetheless the rule that in a case like this, "perfection is by no means required." Vance v. Bradley, supra at 108. This involves a balancing of competing advantages and disadvantages, a legislative function. Whether the cure is worse than the disease is not within the court's province to decide.

Equal Protection analysis allows the courts to question only whether the removal of negligence protection for the guest might protect the host from ingratitude or might encourage free transportation or might prevent fraud on insurer and collusive lawsuits. Whether in fact the guest statute promotes hospitality between driver and guest and collusive lawsuits is not the question: the Equal Protection Clause is satisfied by the court's conclusion that the Delaware Legislature could rationally have decided that its ban on lawsuits by nonpaying guests in the absence of wanton or willful negligence might foster greater hospitality or fewer collusive

lawsuits. What constitutional examination requires is whether the classification bears a reasonable relation to the statutory purpose--whether the class encompasses those persons who must be affected to produce the desired result and whether the statute will reasonably tend to produce the desired result. Behrns v. Burke, supra.

It is not sufficient to argue that some drivers do not rely on the guest statute's protection when they offer free rides nor to argue that there are other ways to prevent collusive lawsuits because the Equal Protection Clause does not require that classifications be drawn with scientific or mathematical precision nor that the statutory classifications cure all evils. All it requires in this context is that the difference in treatment is not arbitrary and unreasonable.

In determining that the classification is reasonably related to its stated objectives,

it is not for this court to decide whether the policies behind the guest statute are wise or necessary and the court need not pass judgment on those matters. Rather, the inquiry should be limited solely to whether the statute violates the constitutional principles stated herein. As the United States Supreme Court stated:

> "We do not inquire whether this statute is wise or desirable, or 'whether it is based on assumptions scientifically substantiated.' Misguided laws may nonetheless be constitutional." James v. Strange, 407 U.S. 128, 133, 92 S.Ct. 2027, 2031, 32 L.Ed.2d 600 (1972).

Whether social and economic conditions have changed to such an extent that a guest statute is no longer useful or desirable is a decision that should be made by the legislature, not the courts. When courts take it upon themselves to make such policy judgments, they infringe upon the power rightly belonging to the legislature which has the right and the duty to make such decisions. Justice v. Gatchell, supra, Keasling v. Thompson, supra, Stoehr v. Whipple, 405 F.Supp. 1249 (D.Neb. 1976); Tisko

v. Harrison, supra.

Finally, after Silver, and until Brown v. Merlo, Cal. Supr., 506 P.2d 561 (1968), there was essentially quiet in the land on the issue of the constitutionality of automobile guest statutes. Merlo admittedly has created the furor. Some states upon reconsideration have declared their automobile guest statutes unconstitutional, while others have observed constancy. Notwithstanding the result in any given case across this nation, it is clear that the issue is being reviewed as a matter of social and economic policy in the state courts and state legislatures. That is as it should be; the issue should be resolved in the States, not in the United States Supreme Court.

The States constitute 50 experimental laboratories and this court said in Dandridge v. Williams, supra, that those 50 laboratories are free to experiment and are given great latitute in the realm of social, economic and political values.

The Delaware Supreme Court has upheld

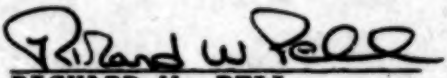
the constitutionality of Delaware's Premise Guest Statute, which is not present before this court, as well as the constitutionality of the Delaware Automobile Guest Statute. The guest statute, applied uniformly and fairly for 49 years in Delaware has not been modified or amended. It involves an issue of public policy which is well-founded and should be upheld until such time as the legislative branch sees fit to change it. This is as it should be in the United States.

Accordingly, the constitutionality of the guest statute should be upheld and the decision of the court below affirmed.

CONCLUSION

This appeal should be dismissed or the decision below affirmed because the question on which the decision depends does not present a substantial Federal question.

Respectfully submitted,



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PROOF OF SERVICE

AND NOW, TO-WIT, this 1st day of November A.D. 1982, I hereby certify that all parties required to be served have been served copies of Appellee's Motion to Dismiss or Affirm for Want of a Substantial Federal Question, and the accompanying brief in support of the motion, that service has been made on Appellant pursuant to Rule 28.3 by personal service, by delivery of three copies thereof on November 1, 1982, to Appellants' counsel of record: Joseph M. Bernstein, Suite 820, Market Tower, 9th & Market Streets, Wilmington, Delaware 19801.

TYBOUT, REDFEARN,
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BY: RICHARD W. PELL
Attorney for
the Appellees

STATE OF DELAWARE)
) ss.
NEW CASTLE COUNTY)

BE IT REMEMBERED that on this 1st day of November 1982, personally appeared before the undersigned, a Notary Public in and for the State and County aforesaid, the deponent, who being by me duly sworn according to law, deposes and says that he is the attorney for Donald W. Bierer, Jr., and Dover Volkswagen, Inc., and is employed in the offices of Tybout, Redfearn, Casarino & Pell, 1110 Bank of Delaware Building, 300 Delaware Avenue, Wilmington, Delaware, and on November 1, 1982, he deposited in the mailbox at 300 Delaware Avenue, Wilmington, Delaware, the attached paper addressed to:

Supreme Court of the United States
1st and Maryland Avenue, N.E.
Washington, D.C. 20543

Donald W. Pell

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

Margaret Ellingwood
NOTARY PUBLIC